be caused by the denial of justice to an alien, such as: [B]y a failure by the state to provide redress for an injury inflicted on the alien by some private person – for example, a failure of the state to provide judicial remedies to an alien on whom physical or economic injury has been inflicted by a resident of the state."[6]

- E. de Vattel's *Law of Nations*,[7] a 1758 legal treatise on international law that has not been digitized, to the best of my knowledge.

Essentially, the Framers and drafters of the Judiciary Act were concerned with avoiding diplomatic strife that could lead to war. It is unlikely that states today would threaten war over corporate violations of human rights. Still, situations in which other states would be able to invoke the international responsibility of the U.S. (and possibly bring a case to the International Court of Justice (ICJ)) map to 18th century concerns over U.S. liability for the actions of private parties.

III. Potential Avenues for Establishing U.S. Liability

A. Under the International Law Commission's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts

Today, the kind of state responsibility the Framers/drafters of the Judiciary Act worried about is codified in the International Law Commission's 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter "Draft Articles on State Responsibility" or "Draft Articles"),[8] which, in most cases, are commonly acknowledged as customary international law.

Broadly, under the Draft Articles, states incur international responsibility for (1) a breach of an international legal obligation when (2) the act can be attributed to the state.[9] The interpretation of both of these elements is important for potential U.S. liability in the *Nestlé* case.

Breach of international legal obligations

Article 3 establishes that characterization of an internationally wrongful act is governed by international law, and is not affected by its characterization as lawful by a state's internal law. This means that any laws passed in Côte d'Ivoire, Mali, or the United States in the corporation's favor have no bearing on potential U.S. liability under international law.[10]

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[6] Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. OF INT'L L. & POL. 1, 20 (1985-1986) (internal citations omitted).
[7] E. DE VATTEL, LAW OF NATIONS, PRELIMINARIES § 3 (J. Chitty et al. transl. and ed. 1883).
[8] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Act*s, *with commentaries*, Report of the International Law Commission on the Work of its 53rd session, A/56/10, August 2001, UN GAOR. 56th Sess Supp No 10, UN Doc A/56/10(SUPP) (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (hereinafter "Draft Articles").
[9] *Caire Claim* (France v. Mexico) (1929) 5 R.I.A.A. 516.
[10] In fact, the United States brought the lawsuit that established this precedent. In the 1872 *Alabama* arbitration, the United States invoked the international responsibility of the United Kingdom (which had declared neutrality during the Civil War) for a British (private) company's supply of ships to the Confederacy, which then damaged Union ships. The arbitral award held that the provision of such ships was an internationally wrongful act in spite of the fact

Acts attributed to the state

It is a virtual certainty that the United States would not be directly liable for the overseas torts of its corporations. Under Articles 4 and 8, states are responsible for the actions or omissions of their own organs, whether de jure or de facto, or by non-state actors operating on the instruction of, or under the "direction or control" of, the state.[11]

The ICJ has interpreted this to mean that, although states may not hide behind their own internal legal system to evade international responsibility, persons or entities are only equated with state organs when the relationship is one of "complete dependence" on the state,[12] and the private party lacks "any real autonomy."[13] In the *Genocide Convention* case,[14] the ICJ examined whether or not Serbia could be held responsible for the Srebrenica massacre (undertaken by Bosnian Serbs in Bosnia). The Court accepted on the facts that the perpetrators of the Srebrenica massacre, belonging to organs of the Republika Srpska in Bosnia (a "non-state" entity) had been recruited before the independence of Bosnia and Herzegovina, and that the Serbian government had provided military and financial support.[15] Moreover, the Court also noted that without Serbian support, the perpetrators would not have been able to undertake the "crucial or most significant military and paramilitary activities."[16] Even so, the Court held that because the Bosnian Serb forces had some autonomy, their actions were not automatically attributable to Serbia.[17]

The Court also examined whether, while not organs of the Serbian government, the perpetrators were acting under Serbian direction and control in light of ILC Article 8. The Court held that, because the state only exercises effective control in respect to each specific internationally wrongful act (*i.e.*, general control is insufficient), the Serbian government would only be responsible if the facts showed "the physical acts constitutive of genocide that have been

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that the ship builder's conduct was legal in the U.K. *See generally*, Alabama claims (U.S. v. U.K.), 24 R.I.A.A. 125-134 (Trib. of arb. Est. by Art. I, Treaty of Washington of 8 May 1871, 1872).

[11] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Judgment, I.C.J. Rep. 2001 (Sept. 10), at 377-78; *see also* Article 4: Conduct of organs of a State. 1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2) An organ includes any person or entity which has that status in accordance with the internal law of the State. Article 8: Conduct directed or controlled by a State. The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

[12] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* at 393; *see also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Rep. 1986 (June 27), at 109.

[13] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* at 394.

[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Judgment, I.C.J. Rep. 2001 (Sept. 10).

[15] *Id.* at 238-39, 388.

[16] *Id.* at 400.

[17] *Id.* at 394 (citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* at 111).

committed by organs or persons other than the State's own agents were carried out wholly or in part, on the instructions or directions of the State, or under its effective control."[18]

Territoriality

In *Democratic Republic of Congo v. Uganda*, the ICJ held that the obligations of all states under all international human rights instruments to which a state is a party and under customary international law apply extraterritorially – *i.e.*, with respect to anyone within the power or effective control of the state.[19] Human Rights bodies such as the Inter-American Commission[20] and the Human Rights Committee[21] have followed suit.

In this respect, corporate activity can trigger state responsibility under the Draft Articles in three ways. The first two of these, based in Articles 4 and 8 (above), would require corporations to either **(1) exercise elements of government authority such that it could be considered an organ of the government** or **(2) act under the direction or control of the government**. In this case, both are impossible. Procuring cocoa is not a government function, and there is no indication that Nestlé acted on the direction or under the control of the United States.

The United States could, however, still face liability under international law for complicity in an internationally wrongful act, or its failure to prevent/implicit legitimation of a situation that violates a peremptory norm of international law (in this case, child slave labor).

1. Article 16

Under Article 16 of the Draft Articles on State Responsibility: "[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

The ILC's commentary on Article 16, moreover, gives examples of situations in which a state would be responsible for aiding and assisting, including "facilitating the abduction of persons on

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[18] *Id.* at 401.
[19] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda*), (Merits) (2006) 45 ILM 271 at [217].
[20] "[T]he term 'jurisdiction' in the sense of Article 1(1) is [not] limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions *of its agents* which produce effects or are undertaken outside that state's territory." I/A Comm. H.R. *Saldano v Argentina*, March 11, 1999, para. 17.
[21] The Human Rights Committee has interpreted Art. 2(1) of the International Covenant on Civil and Political Rights (ICCPR) to extend state responsibility of ensuring Covenant rights to both individuals (*i.e.*, third parties) within the state's territory and those outside the state's territory who are subject to its jurisdiction. HRC, General Comment No 31(80) Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004 at 3; *see also* Robert McCorquodale & Penelope Simons, *Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MODERN L. REV. 598, 603 (2007).
"Jurisdiction" has been construed to mean "anyone within the power and effective control of that State Party, even if not situated within the territory of the State Party . . . regardless of the circumstances in which such power or effective control was obtained." HRC, General Comment No. 31(80) at 10.

foreign soil."[22] It does not seem likely that the United States assisted Mali or Côte d'Ivoire in the procurement or perpetuation of child slavery. Some scholars, however, have argued that because international law has evolved to the point of recognizing that corporations themselves can perpetrate violations, corporate complicity in international crimes could incur international responsibility on the part of the corporation's home state.[23] To argue this, however, one would need to show:

- That the home state had aided or assisted the corporation and that such aid had 'contributed significantly to that act.'[24] (There is no requirement for the assistance to have been essential to the wrongful act.[25])
- That the home state gave aid "with a view to facilitating the commission of the wrongful act," and that the aid had actually done so.[26]
- That the home state was "aware of the circumstances of the internationally wrongful act in question."[27]

One scholar also argues that the provision of services to promote the foreign direct investment of corporations (for example, by providing financing through export credit agencies), could be sufficient to count as aiding and assisting internationally wrongful acts, if the host state is allowing the corporation or its subsidiary to operate within its territory in violation of international human rights obligations (which it has a duty to protect). In this case, the host state is violating human rights law with respect to permitting the corporation's activities, and the corporation's home state is liable for facilitating the conduct.[28]

2. Articles 40 and 41

In addition to Article 16, Articles 40 and 41 impose similar obligations on states.

> *Article 40*
>
> 1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.
>
> *Article 41*
>
> Particular consequences of a serious breach of an obligation under this chapter. 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. 2. No State shall recognize as lawful a situation created by a

[22] *Draft Articles* at 66, cmt. 1.
[23] *See, e.g.*, McCorquodale & Simons, *supra* note 21 at 613-14.
[24] *Id.* at 614 (citing *Draft Articles* at 149, cmt. 5.
[25] *Draft Articles* at 66, cmt. 5.
[26] *Id.*
[27] *Id.*
[28] *See* McCorquodale & Simons, *supra* note 21 at 613.

> serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation [. . .]"

The ILC commentary specifies that the prohibition on recognition of these situations refers to not only formal recognition, but also acts that would imply recognition.[29] The ICJ construed this language in the *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*. The Court held that, because the construction of the wall involved serious breaches of Israel's obligations to "respect the right of the Palestinian people to self-determination and [. . .] obligations under international humanitarian law and international human rights law,"[30] other states were obligated to refrain from recognizing the legality of the situation, and not to aid or assist the maintenance of that situation.[31] Although the ICJ did not refer specifically to Art. 41 of the Draft Articles, it did use the article's actual words.

In this respect, a state allowing its corporations to do business in such an environment could arguably be liable for recognizing the legality of the host state's conduct.

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Available reparations under the Draft Articles include restitution, compensation, or satisfaction.[32] In principle, if restitution is impossible or would result in a disproportionate burden,[33] the injuring state can pay compensation for financially assessable loss (Art. 36); if compensation is also impossible, the responsible state must give satisfaction for the injury caused (Art. 37). **The injured state, however, may choose the form of reparations** (Art. 43). This is a major disadvantage, since the state claiming injury may not always act with the victims' best interests in mind. The same logic holds in the situations in which a non-injured, third-party state may sue (see below).

B. Due diligence

States may not cause transboundary harm (*i.e.*, pollution) from activities arising in their own territory.[34] While this principle developed within international environmental law, it has parallels in human rights law in terms of a responsibility to exercise due diligence. When a private entity or individual has breached an international law norm, the act cannot be attributed to the state – but the state has breached its own due diligence obligations to prevent and punish such violations.[35] Moreover, some scholars argue that

> "[W]here a state has 'sufficient knowledge' of the human rights impact of such activity in the host state, the home state has a duty to prevent and mitigate the risk by adopting

[29] *Draft Articles* at 115, cmt. 5.
[30] Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (Jul. 9), ¶ 149.
[31] *Id.* at ¶ 159.
[32] *Draft Articles*, Arts. 35-37.
[33] *Draft Articles*, Art 35.
[34] Trail Smelter Arbitration (U.S. v. Canada) (1938 and 1941) 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib.) at 331.
[35] TIMO KOIVUROVA, DUE DILIGENCE 35 (2010) Max Planck Encyclopedias of Int'l L..

> legislation to this end. A failure to do so would amount to a breach of the international obligation to exercise due diligence, for which international responsibility arises."[36]

States must exercise due diligence in exact proportion to the risks involved in a third party's conduct.[37]

The ICJ, at least, also considers the degree to which a state is capable of undertaking due diligence. In the *Nicaragua* case, the ICJ examined whether the government of Nicaragua had breached its obligation of due diligence with respect to preventing arms traffic through its territory to El Salvador. In its decision, it stated:

> "[I]t would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States . . . **Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal** for subduing this traffic if it takes place on its territory and the authorities endeavor to put a stop to it."[38]

This logic suggests the opposite is also true – namely, that the ICJ would be more inclined to find a breach of due diligence in situations like the case at hand, in which the United States is perfectly able to exercise a high degree of control over its corporations, should it choose to do so.

Cases alleging a breach of due diligence would likely end up in the ICJ. Because only states can sue states in the ICJ, however, the same problems with reparations described above exist in this scenario.

C. Liability under Specific Treaty Provisions

Most human rights treaties delineate states' general obligations to guarantee human rights to all individuals in their jurisdiction. Some treaties include explicit language requiring States Parties to prevent specific violations of human rights. The ICJ construed such language in the *Genocide Convention* case. Although the Court could not find the actions of the Bosnian Serbs that perpetrated the Srebrenica massacre attributable to Serbia, it did find Serbia liable for genocide on the basis of its failure to prevent, an obligation under the Genocide Convention.[39]

In this respect, similar logic could apply to the United States' failure to prevent the use of child slave labor by its corporations. One treaty that the United States has signed and ratified, ILO Convention No. 182 – Worst Forms of Child Labour (1999),[40] imposes an obligation to actively

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[36] *See, e.g.*, McCorquodale & Simons, *supra* note 21 at 619.
[37] *See, e.g.*, Alabama claims (U.S. v. U.K.), 24 R.I.A.A. 125-134 (Trib. of arb. Est. by Art. I, Treaty of Washington of 8 May 1871, 1872).
[38] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* at 157.
[39] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* at 438.
[40] Article 1, for example, requires each member to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency." Article 7(1) requires members to "take all

prevent child slavery. This does not mean, however, that an international body would necessarily find the United States liable for a violation. While the Genocide Convention at issue in the ICJ case against Serbia specified the Court's jurisdiction for the alleged violations, the ILO Convention on the Worst Forms of Child Labor does not.

That said, it may be possible for a state to take a treaty violation to the ICJ on the basis of the ILC Draft Articles on State Responsibility. Importantly, ILC Article 48(1)(a) specifies that non-injured states can invoke the responsibility of another state if "the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group." The commentary to Article 48 specifies that this could include "a regional system for the protection of human rights;"[41] the principal purpose of such an obligation must be to "foster a common interest, over and above any interests of the States concerned individually"[42] – for example, situations in which States, "attempting to set general standards of protection for a group or people, have assumed obligations to protect non-State entities."[43] Moreover, the commentary to Article 48 refers to the ICJ's guidance in *Barcelona Traction*, which construed obligations *erga omnes* to include "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[44] This means that a third party state could sue the U.S. for violating treaties it signed that require it to prevent slavery and child labor – specifically, ILO No. 182.

With respect to reparations, when a state that hasn't been injured alleges a breach of a peremptory norm under the Draft Articles, it can call for cessation and assurances and guarantees of non-repetition, compliance with the obligation of reparation to the injured state, or, if these are denied, take counter-measures against the violating state.[45] As explained above, this arrangement does not necessarily guarantee the victims' best interests.

necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention *including the provision and application of penal sanctions, or as appropriate, other sanctions*."

[41] *Draft Articles* at 129, cmt. 7.

[42] *Id.*

[43] *Id.* at. 126-27, cmt. 7.

[44] *Id.* at 127, cmt. 9.

[45] JAMES R. CRAWFORD, STATE RESPONSIBILITY ¶¶ 49-51 (2006) Max Planck Encyclopedias of Int'l L.

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Date of BA/BS	**June 2019**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law and Social Change**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Marden Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers beginning in 2024. I am a rising third-year student at NYU where I serve as the Digital Executive Editor of the *Review of Law and Social Change*. I am particularly in the Eastern District of Virginia because I grew up in Washington, D.C., and would like to settle down in Virginia. Further, I am excited by the 'Rocket Docket,' and the chance to participate in many cases on short timelines.

I hope to use this clerkship as an opportunity to apply skills as a writer, researcher, and critical thinker that I have been building throughout my education, but especially during law school. I had the honor to work as a research assistant for Professor Arthur Miller, updating *Federal Practice and Procedure*. It meant a great deal to me that my review, analysis, and summary of hundreds of cases contingent on applications of Rule 50 resulted in a small but material contribution to the practice of law. I also reveled in the chance to TA for CivPro in the fall, and to use what I had learned over the summer to help 1Ls grow.

I would also highlight my clinical placement at the NRDC. As part of a small team working on a complicated case, creativity was just as critical to our output as deep research. I was pleased that several of my own ideas proved useful. But that was only possible with a mastery of detail, and the ability to synthesize facts and law efficiently and effectively.

As a current summer associate at Covington, I am both diving into fresh new areas, such as insurance law, data privacy, and IP disputes, and treading new ground in the more-familiar and ever-intriguing civil procedure. I am taking it all in.

I love learning, and where it concerns the law, I know I have a lot more of that to do. That is my primary goal in seeking this clerkship. I look forward to the chance to grow through experience and service.

Enclosed, please find my resume, law school transcript, writing sample, and letters of recommendation from Professors Randy Hertz, Arthur Miller, and Catherine Sharkey. I am available for an interview at your convenience, either in-person or remotely. Thank you for your time and consideration.

Respectfully,

/s/

Benjamin Mishori Donvan

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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York
Candidate for J.D., May 2024
Honors: *N.Y.U. Review of Law & Social Change*, Digital Executive Editor
Activities: Teaching Assistant, Civil Procedure (Fall 2022)
American Constitution Society, Membership & Media Chair
Law Revue, Actor, Writer, and Producer
Marden Moot Court Competition (Fall 2022)

UNIVERSITY OF CHICAGO, Chicago, Illinois
B.A. in History, *General Honors*; Minor in Human Rights, June 2019
Honors: Dean's List (all years)
Chicago Center for Jewish Studies Undergraduate Essay Prize (2018)
Activities: Dormitory House President (2016-2017), Dormitory House RA (2017-2019)
Run for Cover A Cappella Group, Treasurer
UChicago Glee Club, Duke

EXPERIENCE

COVINGTON & BURLING LLP, New York, NY
Summer Associate, Summer 2023
Participate in all aspects of complex commercial litigation and white-collar matters, including a pharmaceutical contractual dispute and a high-stakes Congressional investigation. Research includes projects on media law; remote international depositions and the Hague Evidence Convention; and New York law on "known loss" provisions in insurance coverage for products liability claims.

NATURAL RESOURCES DEFENSE COUNCIL, New York, NY
NYU Environmental Law Clinic, Spring 2023
Participated in all aspects of a lawsuit against a federal agency. Wrote research memoranda on Endangered Species Act consultation; Clean Water Act permitting, interstate pollution, and point sources; and Fourth Circuit pleading standards, standing requirements, and agency action review.

PROF. ARTHUR R. MILLER, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Research Assistant, June 2022 – January 2023
Conducted extensive legal research in civil procedure; updated Wright & Miller's Federal Practice and Procedure treatise, Volumes 9B (FRCP 46-50), 14A (Foreign Sovereign Immunities Act), and 14AA (Jurisdiction of D.C. Courts), focusing heavily on *Palin v. NYT* and *Cassirer v. Thyssen-Bornemisza*.

GOVERNMENT ACCOUNTABILITY PROJECT, Washington, DC
Junior Fellow, February 2021 – August 2021; ***Legal Intern,*** November 2019 – June 2020
Supported attorneys in various whistleblowing and FOIA matters. Drafted legal documents and disclosures to Congress and administrative agencies on issues like gross mismanagement at Ft. Bliss EIS, politically motivated antitrust investigations at DOJ, and climate denialism at DOI.

ADDITIONAL INFORMATION

In 2020, volunteered at Public Counsel and chaired a committee for the DC Ward 2 Democrats. Hobbies include: singing and performing; writing sketches and screenplays; and homebrewing beer.

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Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Colleen P Campbell			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Randy Hertz			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Arthur R Miller			
Contracts	LAW-LW 11672	4.0	B
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Trevor W Morrison, Alison J Nathan			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Daryl J Levinson			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Colleen P Campbell			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Adam M Samaha			
Torts	LAW-LW 11275	4.0	A-
Instructor: Catherine M Sharkey			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Trevor W Morrison, Alison J Nathan			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	A-
Instructor: Marcel Kahan			
Business Crime	LAW-LW 11144	4.0	A-
Instructor: Jennifer Hall Arlen			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Arthur R Miller			
Economic Analysis of Public Law	LAW-LW 12695	4.0	B+
Instructor: Ryan J Bubb, David Carl Kamin			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Environmental Law Clinic Seminar	LAW-LW 10633	2.0	A
Instructor: Kimberly W Ong, Eric A Goldstein			
Criminal Procedure: Post-Conviction Simulation	LAW-LW 10675	4.0	A
Instructor: Randy Hertz			
Environmental Law Clinic	LAW-LW 11120	3.0	A-
Instructor: Kimberly W Ong, Eric A Goldstein			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: Trisha Michelle Rich			
Business Torts: Defamation, Privacy, Products and Economic Harms	LAW-LW 11918	4.0	B+
Instructor: Catherine M Sharkey			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	60.0	60.0

Staff Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

New York University
A private university in the public service

School of Law

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Arthur R. Miller
University Professor

Dear Judge:

I am writing on behalf of Ben Donovan, who is applying for a position as your clerk following his graduation from the New York University School of Law in the Spring of 2024. Based on Mr. Donovan's first-year classroom and examination performance, I invited him to be one of my full time research assistants for the summer following his first year. He also was in my Complex Litigation course this past Spring and was a very successful teaching assistant for my civil procedure course in the fall of his second year.

As a research assistant Mr. Donovan edited and updated certain portions of the annual supplementation of sections related to Federal Rules 46 through 50 in the multivolume Wright and Miller Federal Practice and Procedure treatise. In addition he helped update the Civil Procedure hornbook I coauthor, particularly the material related to those and other rules. This was part of an effort to produce a new edition, which has now been published. In the course of working on these projects, Mr. Donovan did a considerable amount of research, editing, and writing, much of which required a great deal of thought, writing ability, legal analysis, and judgment on his part.

Ben's research and writing was excellent. His work product was complete and sound, indicating considerable mental ability, a good command of research techniques, good writing, and organizational skills. He also was able to master several aspects of federal civil procedure, some of which are complex. He worked on several topics that were outside the first year procedure course and difficult for someone with only one year of law school. He writes clearly and logically with an good sense of structure and idea sequence.

Ben is bright, thoughtful, analytically sound, and takes instruction and direction well. He also is constantly aware of the value of professional improvement. Mr. Donovan is a very helpful person by nature. He is conscientious and assisted other researchers to get things done so that we could stay on schedule. Ben's work always was done in timely fashion, with care and attention to detail. He understood fully the professional character and utility of his work. He is curious about issues, both legal and non-legal. He is willing to dig though materials until he fully understands them. I consider Ben to have been a reliable research assistant.

Mr. Donovan has a solid commitment to the law as a profession. I have no doubt about his seriousness in terms of long-term career development. I am certain he will do well with his law firm experience at Covington & Burling this summer following his second year of law school. Ben is a likable and good-natured individual; he has a pleasant personality, sense of humor, and is a good conversationalist. I thoroughly enjoy his company, even though a good deal of it

during his civil procedure couse had to be virtual because of Covid. He is mature, broad gauged in his outlook, fields of interest, and is very much interested in the world around him.

On the basis of my experience with him, Ben should fit in well in the collegial environment of a judge's chambers. He worked effectively with the other researchers the summer he spent with me and that should be true with regard to working with you and your other clerks and staff. I believe he can perform whatever tasks you ask of him.

If I can be of any further assistance to you with regard to Ben, please do not hesitate to communicate with me.

Sincerely,

Arthur R. Miller

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Benjamin Donvan for a clerkship in your chambers. I first came to know Ben as a student in my 1L Torts class during the Spring 2022 semester (in which he earned an A-). Ben was also a student this past semester in my Business Torts seminar, in which he has earned a B+.

Ben was a valuable participant in my Torts class. He showed great interest and deep thinking about the role of tort law in advancing civil rights. He was engaged in our class discussions about tort law in the context of workplace and sexual harassment, and its use in the context of other civil rights disputes, such as in Sines v. Kessler, which arose from the 2017 Unite the Right event in Charlottesville.

Ben was also an engaged member of my Business Torts class. He showed great interest in the areas of defamation and disinformation, including in the Alex Jones trials, and his final paper offered an interesting perspective on the expansion of defamation protections to new media. He has also demonstrated great interest in AI algorithms and federal preemption of tort law.

On a personal level, Ben is a thoughtful, personable, and mature young man
who exhibits a genuine interest in the material. I believe he would be a valuable asset to your chambers. I hope you will seriously consider him as a candidate.

Sincerely,

Catherine M. Sharkey
Segal Family Professor of
Regulatory Law and Policy

Catherine Sharkey - catherine.sharkey@nyu.edu - 212-998-6729

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Ben Donvan for a clerkship.

I have had the pleasure of working with Ben in two courses. In his first semester of law school, he was in my 1L Criminal Law course. In the Spring semester of his second year, he was in my Criminal Procedure course.

In the 1L Criminal Law course, Ben stood out in a very large class (95 students) because he often made highly thoughtful comments in class. He received an A- in the course, based entirely on the exam. His exam score was only two points short of receiving an A.

In the Criminal Procedure course, he easily earned an A based on his outstanding work on the two papers for the course. In one paper, the students write a memorandum of points and authorities in support of a defense motion to limit the prosecution's use of the defendant's prior convictions to cross-examine the defendant at trial if he chooses to take the witness stand. The other paper takes the form of an internal memo from a capital defender office staff attorney to a supervising attorney about a number of substantive legal issues: the validity of the capital jury sentencing instructions in the case; a potential Brady claim; a potential claim of ineffective assistance of counsel; the availability of state postconviction review under the applicable state statutes despite the failures of trial and appellate counsel to preserve the claims; and the availability of federal habeas corpus review if the state postconviction courts rely on procedural bars to decline to reach the merits of the substantive legal claims.

In the papers, Ben demonstrated that he is an excellent researcher (he found all of the relevant authorities), a first-rate writer (his papers were extremely well-structured and he presented all of her arguments clearly and persuasively), and has terrific judgment (he made excellent choices about which of the potentially available arguments to make and which to forego, and he framed the arguments in the most persuasive way). I was impressed by the high quality of his work.

I believe that the characteristics I have observed in Ben – his intelligence; first-rate skills of researching and writing; thoughtfulness; and good judgment – would enable him to do an excellent job as a law clerk.

Respectfully,
Randy Hertz

Randy Hertz - hertz@nyu.edu - 212-998-6434

Benjamin M. Donvan

UNITED STATES DISTICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, vs. DANIEL DAVIS, Defendant	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEFENDANT'S IN LIMINE MOTION TO EXCLUDE THE PRIOR CONVICTION**

ARGUMENT[1]

Defendant Daniel Davis moves to exclude his prior conviction under Fed. R. Evid. 609 if he elects to testify at trial. Under Rule 609(a)(1)(B), the probative value of admitting the prior conviction does not outweigh the prejudicial effect on Mr. Davis. Secondly, under Rule 609(a)(2), Mr. Davis's prior conviction for willfully injuring Government property, 18 U.S.C. § 1361, did not require proving a dishonest act or false statement.

I. Under Rule 609(a)(1)(B), the Probative Value of Admitting the Prior Conviction Does Not Outweigh the Prejudicial Effect to Mr. Davis

Rule 609(a)(1)(B) indicates Mr. Davis's conviction is inadmissible. Its potential probative value is greatly outweighed by its prejudicial effect because the prior conviction and the currently charged crimes are substantially similar, Mr. Davis has had a clean criminal record in the ensuing years, only Mr. Davis can testify to certain material circumstances, and destroying government property has no bearing on Mr. Davis's credibility.

[1] I wrote this memorandum for the course Criminal Procedure: Arraignment to Postconviction Simulation, I took in Spring of 2023. I received no outside help in writing. A friend skimmed the writing this past week but only suggested two minor grammatical edits.

A. The Prior Conviction is Covered by Rule 609(a)(1)(B)

Rule 609 provides that a defense witness's credibility can be attacked by evidence of a criminal conviction, and the evidence "must be admitted," where the relevant crime was "punishable by death or imprisonment for more than one year," and "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1)(B).

In 2016, Mr. Davis was convicted upon his admission of guilt for willfully injuring Government property by breaking the doors of postal boxes under 18 U.S.C. § 1361, causing damage in excess of $1,000. For damages greater than $1,000, the statute permits imprisonment "for not more than ten years," in addition to potential fines. 18 U.S.C. § 1361. This conviction is covered by the Rule's plain meaning.

B. The *Bedford* Factors Analysis Indicates that Admitting the Prior Conviction Would Be Unduly Prejudicial to Mr. Davis

When considering the probative value of a potential statement versus its potential prejudicial effect, Third Circuit courts balance four factors: "(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness' testimony to the case; (4) the importance of the credibility of the defendant." *Gov't of V.I. v. Bedford*, 671 F.2d 758, 761 n.4 (3d Cir. 1982). District courts have "discretion to determine when to inquire into the facts and circumstances underlying a prior conviction and how extensive an inquiry to conduct." *U.S. v. Lipscomb*, 702 F.2d 1049, 1068 (D.C. Cir. 1983) (often favorably referenced in Third Circuit).

1. The Kind of Crime is Substantially Similar and Not Impeachable

In evaluating the underlying crime in the prior conviction, "courts consider the impeachment value of the prior conviction as well as its similarity to the charged crime." *U.S. v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014) (citing 5 Jack B. Weinstein & Margaret A. Berger,

Weinstein's Federal Evidence § 609.06 [3][b] (2d ed.2011)). "Impeachment value" refers to how relevant the prior conviction is to the witness's truthfulness. *Id.* "Prior convictions which are for the same or substantially the same conduct as the charged crime should be admitted sparingly because of their prejudicial effect." *U.S. v. Wilson*, 2016 WL 2996900, *2 (D.N.J. May 23, 2016) (citing *Gordon v. U.S.*, 383 F.2d 936, 940 (D.C. Cir. 1967)). A prior conviction need only "bear[] resemblance" to an alleged crime to be inadmissible. *U.S. v. Wise*, 581 F. Supp. 3d 656, 659 (D.N.J. 2022) (in a 609(b) ruling, prior sexual battery conviction overly resembled child sexual abuse material allegations).

Admitting prior convictions for such similar conduct, may cause a jury to "unfairly assume the defendant is prone to commit the particular offense and so must be guilty of the current charges." *Id.* (citing *Caldwell*, 760 F.3d at 286-87); *see also Old Chief v. U.S.*, 519 U.S. 172, 180 (1997) (prior convictions could cause a jury to "generaliz[e] a defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged."); *U.S. v. Sanders*, 964 F.2d 295, 297-98 (4th Cir. 1992) ("The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged.").

The probative value of Mr. Davis's prior conviction does not outweigh its prejudicial effect. His prior conviction is willful injury of Government property under 18 U.S.C. § 1361 and he is now charged with two counts each of committing forgery 18 U.S.C. § 495 and mail theft under 18 U.S.C. § 1708. The prior conviction is too similar to mail theft to be admitted into evidence. While willful injury of Government property may not be identical to mail theft, they are quite similar and do "bear[] resemblance" to one another. *Wise*, 581 F. Supp. 3d at 659.

First, a juror may associate injury to government property with the destruction of the mailbox at 1207 MacArthur Boulevard, a key fact upon which the entire case is built. The statute covers theft of mail from any "letter box" or "mail receptacle," 18 U.S.C. § 1708, and allegedly, such theft here was accomplished via "ripp[ing] open" Vivian Vincent's mailbox. (App. B. at 2.) A letterbox pried open in such a manner is intimately linked to Mr. Davis's prior injury of the government mailbox. Even if the court can do no more than ask whether he was convicted, *U.S. v. Sallins*, 1993 WL 427358 (E.D.P.A. Oct. 18, 1993), his destruction in the past becomes material to the present destroyed mailbox. With the first link, the chain is forged.[2] Proving every charge is contingent on showing his initial breach of the mailbox. Mr. Davis could not have stolen the mail or possessed it, nor forged the signature on the check or cashed it without first damaging the mailbox. Admitting the prior conviction would heighten the risk of impermissible inference of Mr. Davis's guilt. *See U.S. v. Miller*, 2004 WL 2612420, at *5 (E.D.P.A. Nov. 16, 2004). And the danger of "unfair prejudice, even with a limiting instruction … outweighs the probative value of the evidence." *United States v. Cherry*, 2010 WL 3156529, at *6 (E.D.P.A. Aug. 10, 2010).

Regarding the potential impeachment value, the circumstances of the conviction matter. Mr. Davis was sentenced to 15 months' probation, rather than anything approaching the ten years' imprisonment permitted by the law, suggesting this offense was altogether relatively inoffensive and insignificantly impeachable. *See U.S. v. Bernard*, 2021 WL 3077556 (E.D.P.A. Jul. 21, 2021) (relatively low sentences weigh against the impeachment value of evidence). Davis's decision to plead guilty rather than go to trial may further reduce the impeachment value of the conviction, because a defendant's admission of guilt in a plea deal suggests they are

[2] *Star Trek: The Next Generation* (April 29, 1991) (albeit taken somewhat out of context).

honest. *See Lipscomb*, 702 F.2d at 1066 (discussing then-Senator Biden's belief that pleading guilty speaks well to a defendant's credibility). While "felony conviction[s] ha[ve] some inherent impeachment value," the connection between the destruction of Government property and Mr. Davis's "likelihood of testifying truthfully is attenuated." *Bernard*, at *2.

2. The Age of the Conviction Reduces the Probative Value of the Admission

Convictions more than ten years old must satisfy the requirements of 609(b) for admission. "But even where the conviction is not subject to the ten-year restriction, 'the passage of a shorter period can still reduce [a prior conviction's] probative value.'" *Caldwell*, 760 F.3d at 287 (citing 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6134, at 258 (2d ed.2012)). "A conviction's age weighs particularly in favor of exclusion 'where other circumstances combine with the passage of time to suggest a changed character.'" *Id.* In practice, courts have found that "the probative value of a conviction decreases as its age increases." *United States v. Cherry*, 2010 WL 3156529, at *7 (E.D.P.A. Aug. 10, 2010).

Six and a half years ago, on December 31, 2016, twenty-two-year-old Daniel Davis plead guilty to violating 18 U.S.C. 1361. He was sentenced to 15 months of probation, which he completed without issue. This was his only brush with the law, and he now works full-time as a forklift operator at a radiator plant. Mr. Davis's spotless record over the past six and a half years, in addition to his full-time employment, "suggest[s] a changed character." *Caldwell*, 760 F.3d at 287 (citation omitted). For that reason, the age of his prior conviction weighs against its admission.

3. Mr. Davis's Own Testimony is Required at Trial

A defendant's "tactical need … to testify on his own behalf may militate against the use of impeaching convictions." *Caldwell*, F.3d at 287 (citations omitted). If the accused must testify

to refute strong prosecution evidence, "the court should consider whether, by permitting conviction impeachment, the court in effect prevents the accused from testifying." *Id.* But if "the defense can establish … the defendant's testimony by other means," a defendant's testimony is less necessary, and a prior conviction is more likely to be admitted. In other words, the prejudicial impacts of admission may be lessened if other defense witnesses can provide the same testimony as the defendant. *See*, *e.g.*, *United States v. Causey*, 9 F.3d 1341 (7th Cir. 1993).

The third Bedford factor further supports excluding the prior conviction. Several witnesses can attest to Mr. Davis's presence at the Veterinary Clinic. (App. B. at 7.) They can testify to his presence in the procedure room, the length of the procedures, his signatures, and the probable time he spent in the waiting room. But with respect to actual times, they can only concretely support that he called the clinic at 9:10 A.M. and that his dog was discharged at 10:50 A.M. (App. B. at 7-8.) Beyond that, there exist greater windows of uncertainty and many variables at play. For one, if the mailman arrived at 1207 MacArthur Blvd as early as 9:25 A.M., (App. B. at 4-5.), and everything else, including transit, (App. B. at 8.), and the medical procedure, (App. B. at 7-8.), had gone as quickly as possible, that would leave approximately ten to fifteen minutes when something could have happened to the mailbox before Vivian Vincent came down to check her mail at approximately 10 A.M. (App. B. at 3.) Alternatively, Mr. Davis may have even left the building immediately after his phone call, hit heavy traffic, sat through a longer procedure, and still have been discharged at 10:50 A.M. There are too many uncertainties to rely wholly on other defense witnesses for this period. Only Mr. Davis can testify about this timeline. Further, only Mr. Davis can testify with respect to never having been to the liquor store in Bensalem. Just a single witness, Boris Smirnoff, testified to having identified Mr. Davis as the man he believed cashed the check at a police line-up. (App. B. at 5.) Challenging enough as it is

to prove a negative—that he had never been to the store—only Mr. Davis can testify on this matter.

4. Mr. Davis's Credibility is Not Sufficiently Significant to the Case

The fourth factor concerns the significance of the defendant's credibility to the case. "When the defendant's credibility is a central issue, this weighs in favor of admitting a prior conviction." *Caldwell*, 760 F.3d at 288 (citation omitted). In a case "reduced to a swearing contest between witnesses, the probative value of a conviction is increased." *Id.* When a defendant testifies, he places his own credibility at issue. *See United States v. Beros*, 833 F.2d 455, 463-64 (3d Cir. 1987).

This factor may lean slightly towards admission of the prior conviction, but not enough to overcome the first three factors which favor exclusion. Especially with respect to the forgery charges and Mr. Davis's presence at the liquor store, this case may settle into a "he said, they said" battle between Mr. Davis, Mr. Smirnoff, and the prosecuting attorneys. *Caldwell*, 760 F.3d at 288. Yet, it should further be noted that, given Mr. Davis's story is corroborated by the Veterinary Clinic and its employees, there is evidence that Mr. Davis is credible. That is, going on the stand to testify, having already been supported in asserting he was not present when the mailbox was broken into—having been made credible there—lends credence to the idea that Mr. Davis is credible with respect to the forgery charges and the check cashing at the liquor store, too.

Taken together, the *Bedford* factors tilt the Rule 609(a)(1)(B) scales too far in the direction of prejudice to admit Mr. Davis's prior conviction. The conviction simply does not "tangibl[y] contribut[e] to the evaluation of credibility" necessary to outweigh prejudice.

Caldwell, 760 F.3d at 286. The crime is too similar, the conviction too old, the testimony too important, and the credibility insufficiently material.

II. Under Rule 609(a)(2), the Prior Conviction Did Not Require Proving a Dishonest Act or False Statement

Rule 609(a)(2) further indicates that Mr. Davis's prior conviction is inadmissible, because 18 U.S.C. § 1361 does not require proving any dishonest act or false statement.

A. 18 U.S.C. § 1361 Does Not Explicitly Contain a Dishonest Act or False Statement nor is it Similar to a *Crimen Falsi*

"The proper test for admissibility under Rule 609(a)(2) does not measure the severity or reprehensibility of the crime, but rather focuses on the witness's propensity for falsehood, deceit, or deception." *Cree v. Hatcher*, 969 F.2d 34, 38 (3d Cir. 1992). Automatic admission of a prior conviction under Rule 609(a)(2) requires a court to determine that "establishing the elements of the crime required proving … a dishonest act or false statement." Fed. R. Evid. 609(a)(2). *See also*, *Cree v. Hatcher*, 969 F.2d 34, 38 (3d Cir. 1992) (before the 2006 amendment, writing that "dishonesty or false statement is an element of the statutory offense."). A crime "must involve expressive dishonesty to be admissible under Rule 609(a)(2)." *Walker v. Horn*, 385 F.3d 321, 334 (3d Cir. 2004). Generally, Rule 609(a)(2) is interpreted narrowly, and meant to exclude potentially dishonest crimes such as theft that do not "bear on the witness's propensity to testify truthfully." *United States v. Johnson*, 388 F.3d 96, 100 (3d Cir. 2004) (citing to the Conference Committee).

The elements of 18 U.S.C. § 1361 are "(1) willfully injuring; (2) Government property." Neither willful injury, nor the requirement that the injured property belongs to the Government, require proving "a dishonest act or false statement." Fed. R. Evid. 609(a)(2). Therefore, Mr.

Davis's willful injury of Government property should not be covered by the statute. That Mr. Davis did so to steal mail from within the mailbox is immaterial. He was charged with theft in the indictment, although that count was ultimately dismissed in the plea deal—but an indictment is not a conviction under Rule 609. *See U.S. v. McBride*, 862 F.2d 1316, 1320 (8th Cir. 1988). On the conviction alone, Mr. Davis only willfully injured Government property, circumstances aside, which has "little or no direct bearing on [his] honesty and veracity." *U.S. v. Estrada,* 430 F.3d 606, 617-18 (2d Cir. 2005).

Willful injury of Government property in this context is more akin to a crime of violence, which is not covered by 609(a)(2), than a crime of deceit. *But cf. U.S. v. Melaku*, 41 F.4th 386 (4th Cir. 2022) ("willfully injuring or committing depredation against property of United States was not "crime of violence," and thus could not serve as predicate to charge for using, carrying, and discharging firearm during crime of violence.). 18 U.S.C. § 1361 shares commonalities with a bevy of other non-deceitful crimes. *See*, *e.g.*, *U.S. v. Meserve*, 271 F.3d 314 (1st Cir. 2001) (assault and disorderly conduct). While destroying the mailbox with an automobile jack handle may indicate Mr. Davis has "a short temper" or "a combative nature," and his actions were certainly wrong, they have no bearing on his honesty. *Estrada*, 430 F.3d at 617-18.

CONCLUSION

Mr. Davis's prior conviction should be excluded under Fed. R. Evid. 609 if he elects to testify at trial. As shown above, under Rule 609(a)(1)(B), the probative value of admitting the prior conviction does not outweigh the prejudicial effect to Mr. Davis. The prior conviction is too similar to one of the alleged crimes, the conviction is too old to meaningfully impugn his credibility, his testimony is required to speak for various ambiguous unaccounted-for windows of time, and his credibility is not sufficiently at issue such that it is material to the case.

Secondly, under Rule 609(a)(2), Mr. Davis's prior conviction did not require proving a dishonest act or false statement, so should not be automatically introduced to the evidentiary record.

Applicant Details

First Name	**Nathaniel**
Last Name	**Drum**
Citizenship Status	**U. S. Citizen**
Email Address	**drumnc21@wfu.edu**
Address	**Address** Street **525 Crowne Oaks Circle** City **Winston-Salem** State/Territory **North Carolina** Zip **27106** Country **United States**
Contact Phone Number	**(828) 234-4485**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2018**
JD/LLB From	**Wake Forest University School of Law** **http://www.law.wfu.edu**
Date of JD/LLB	**May 13, 2024**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**Wake Forest Law Review** **Wake Forest Journal of Business & Intellectual Property**
Moot Court Experience	**Yes**
Moot Court Name(s)	**American Bar Association National Moot Court Team** **Wake Forest Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

WAKE FOREST UNIVERSITY
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Judge Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am writing to express my interest in a term clerkship with your chambers beginning in Fall 2024. I am currently a third-year student at Wake Forest University School of Law, where I have had the pleasure to serve as the Captain of the National Trial Team, a member of the American Bar Association National Moot Court Team, and a staff editor for the *Wake Forest Law Review*, the *Wake Forest Journal of Business & Intellectual Property*, and the symposium edition of the *Harvard Journal of Law & Policy*.

As an aspiring litigator, I am particularly interested in a clerkship with your chambers due to the wide variety of cases and issues that come before your Court. Further, as a native of the Carolinas, with a strong network of friends and family throughout Virginia, North Carolina, and South Carolina, I hope to begin building connections in the Virginia legal community. With my long-term goal of building a litigation practice in the Norfolk area, the opportunity to serve as a clerk for the United States District Court for the Eastern District of Virginia through your chambers would be an invaluable experience.

Enclosed are my resume, transcripts, and a writing sample. The writing sample is a simulated memorandum order and opinion written during my elective Writing for Judicial Chambers course denying a litigant's motion to transfer venue. Also enclosed are letters of recommendation from the following individuals, who are also willing to answer any questions you may have:

Timothy Davis
Wake Forest School of Law
1834 Wake Forest Rd.
Winston-Salem, NC 27106
davistx@wfu.edu
(336) 758-3670

Kenneth Carlson, Jr.
Constangy, Brooks, Smith & Prophete
One West 4th St.; Suite 850
Winston-Salem, NC 27101
kcarlson@constangy.com
(336) 721-6843

Ashley DiMuzio
Bell, Davis & Pitt
101 N. Cherry St.; Suite 600
Winston-Salem, NC 27101
adimuzio@belldavispitt.com
(336) 722-3700

I am happy to provide a list of independent references, as well as any other information or documentation that would be helpful to you. Thank you for your time and consideration, and I would welcome the opportunity to discuss this matter further.

Sincerely,

Nathaniel C. Drum

Enclosures

Nathaniel C. Drum

525 Crowne Oaks Circle, Winston-Salem, NC 27106 || (828) 234-4485 || drumnc21@wfu.edu

Education

Wake Forest University School of Law Winston-Salem, NC
Candidate for Juris Doctor, May 2024 GPA: 3.75 (Top 8%)

Honors and Awards:

- Pro Bono Honor Society
- Cynthia J. Zeliff Mock Trial Competition Semi-Finalist
- 1L Trial Competition Honorable Mention
- Edwin M. Stanley Moot Court Competition Top 16 Finalist
- Dean Suzanne Reynolds Award for highest grade in Legal Research II; Pre-Trial Practice & Procedure; and Trade Secrets & Unfair Competition

University of North Carolina at Charlotte Charlotte, NC
Paralegal Certificate, December 2018

University of North Carolina at Chapel Hill Chapel Hill, NC
Bachelor of Arts in Political Science, May 2018
Second Major in Peace, War, and Defense; Minor in History

Law School Leadership & Activities

- National Mock Trial Team Captain
- *Wake Forest Law Review*: Staff Editor
- *Wake Forest Journal of Business & Intellectual Property*: Staff Editor
- *Harvard Journal of Law & Policy*: Symposium Edition Staff Editor
- Student Trial Bar: 1L Mock Trial Competition Co-Chair
- American Bar Association Moot Court Competition Team Member
- Teaching Assistant for Contracts I
- Pro Bono Project: Expungements Clinic Coordinator
- Federalist Society: Vice President for Speakers; 1L Class Representative
- First Generation Law Society: Mentorship Committee Co-Chair

Experience

Restoring Integrity & Trust in Elections Washington, D.C.
Summer Law Clerk June 2023 - July 2023

- Conducted a legal research and a historical analysis of voting rights laws during the ratification of the Constitution, during the ratification of the Fourteenth Amendment, and during the ratification of each suffrage amendment in order to identify areas for potential future litigation
- Drafted, critiqued, summarized, and edited court filings including Motions to Intervene, Motions to Dismiss, and Motions for Summary Judgment in ongoing election law litigation cases

Honorable Hunter Murphy, North Carolina Court of Appeals Raleigh, NC
Judicial Intern July 2022 - December 2022

- Drafted bench memoranda, court orders, and judicial opinions for complex criminal and civil cases
- Reviewed and analyzed appellate briefs and conducted legal research in order to prepare Judge Murphy for oral arguments and case conferences

Truist Financial Winston-Salem, NC
Legal Intern June 2022 - July 2022

- Conducted legal research and drafted memoranda regarding liability for electronic service outages
- Compiled and analyzed new and amended state statutes regulating the collection, storage, use, and distribution of consumer data and private information

Moore & Van Allen Charlotte, NC
1L Summer Associate May 2022 - June 2022

- Conducted research and drafted memoranda regarding various issues including contract interpretation, property rights, and evidentiary standards
- Accompanied attorneys and created summary reports regarding civil motions hearings, depositions, and bankruptcy court proceedings

James, McElroy & Diehl Charlotte, NC
Family Law Paralegal December 2020 - July 2021

- Wrote, reviewed, and edited complaints, answers, and motions relating to all family court matters including child support, child custody, spousal support, and equitable distribution
- Collaborated with attorneys to prepare for trials and motion hearings by writing issue synopses, creating evidence binders, and researching relevant case law and statutes

North Carolina Department of Public Safety Gastonia, NC
Probation and Parole Officer April 2020 - December 2020

- Appeared in court and presented case details to the court including steps taken to engage defendants in community activities and the impact of those initiatives on defendants' conduct
- Reviewed case files and met with defendants to make connections with city, county, and state resources and address identified criminogenic needs to reduce the risk of recidivism

North Carolina Department of Public Safety Newton, NC
Judicial Services Coordinator July 2019 - April 2020

- Interviewed and elicited information from convicted offenders regarding their contact information, demographics, employment, education, and criminal background
- Analyzed information and made community service work-site placement decisions based on various factors, including the defendants' availability, criminal background, work history, and skill set

Publications

Copyrighting the Courthouse: The Rise of Copyright Claims on Live Broadcasts of Public Trials, Wake Forest J. Bus. & Intell. Prop. L. Blog, http://ipjournal.law.wfu.edu/blog/. *Publication Forthcoming'*

Community Involvement

The Fund for American Studies Summer Law Fellow
North Carolina Summer Appellate Seminar Participant
North Carolina Advocates for Justice & North Carolina Bar Foundation Mock Trial Competition Volunteer
MockOn High School Mock Trial Competition Volunteer Judge
Elon University Carolina Classic Mock Trial Competition Volunteer Judge
Charlotte Curling Association Volunteer Curling Instructor

Student Name: **Nathaniel Corey Drum**

ID: 06423745 Birthdate: 03/07 Entry Date: Aug 16, 2021

Majors: Law Certificates and Foreign Area Studies

Minors:

Office of the University Registrar
P.O. Box 7207
Winston Salem NC 27109-7207

School of Law

Issued To:

Nathaniel Drum
Parchment:TWB7DZ6K

Date Printed: 09-JUN-2023 Page: 1

Course Level: Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2021						
LAW	101	Contracts I	3.00	A	12.000	
LAW	103	Criminal Law	3.00	A-	11.010	
LAW	104	Civil Procedure I	3.00	A-	11.010	
LAW	108	Torts	4.00	A-	14.680	
LAW	110	Legl Analysis, Writing & Res I	2.00	B+	6.660	
LAW	112	LAWR I (Research)	0.50	A-	1.835	
LAW	122	Professional Development	0.00	S	0.000	
Ehrs: 15.50 GPA-Hrs: 15.50 QPts: 57.195 GPA: 3.690						
Spring 2022						
LAW	102	Contracts II	3.00	A	12.000	
LAW	105	Civil Procedure II	3.00	A-	11.010	
LAW	111	Property	4.00	B+	13.320	
LAW	113	LAWR II (Research)	0.50	A+	2.000	
LAW	119	Legl Analysis, Writng & Res II	2.00	A	8.000	
LAW	120	Constitutional Law I	3.00	A-	11.010	
LAW	122	Professional Development	1.00	A*	0.000	
Ehrs: 16.50 GPA-Hrs: 15.50 QPts: 57.340 GPA: 3.699						
Fall 2022						
LAW	207	Evidence	4.00	A	16.000	
LAW	219	Appellate Advocacy LAWR III	2.00	B+	6.660	
LAW	340	Externship	2.00	H	0.000	
LAW	522	Jrnl of Bus & Intel Prop Law	0.00	P	0.000	
LAW	570	Pre-Trial Practice & Procedure	3.00	A+	12.000	
LAW	610	Trial Practice Lecture	0.00	P	0.000	
LAW	610L	Trial Practice Lab	3.00	H	0.000	
LAW	615	Trial Team	1.00	H	0.000	
Ehrs: 15.00 GPA-Hrs: 9.00 QPts: 34.660 GPA: 3.851						
Spring 2023						
LAW	200	Legislation and Admin Law	3.00	A	12.000	
LAW	305	Professional Responsibility	3.00	A	12.000	
LAW	340	Externship	2.00	W	0.000	
LAW	401	Agency	2.00	A	8.000	
LAW	427	Writing for Judicial Chambers	2.00	B	6.000	
LAW	427L	Leg Analy Writ & Research IV	0.00	P	0.000	
LAW	522	Journal of Business & IP Law	2.00	P	0.000	
LAW	597	Trade Secrets & Unfair Compet	2.00	A+	8.000	
LAW	615	Trial Team: National	1.00	H	0.000	
Ehrs: 15.00 GPA-Hrs: 12.00 QPts: 46.000 GPA: 3.833						
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Fall 2023						
IN PROGRESS WORK						
LAW	479	Creditrs' Rghts & Bnkrptcy(ON)	4.00	IN PROGRESS		
LAW	514	Federal Courts	3.00	IN PROGRESS		
LAW	533	Artificial Intelligence Law	2.00	IN PROGRESS		
LAW	538	Antitrust	2.00	IN PROGRESS		
LAW	576	Complex Civil Litigation	3.00	IN PROGRESS		
LAW	636	Construction Law	2.00	IN PROGRESS		
In Progress Credits 16.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	62.00	52.00	195.195	3.753
TOTAL TRANSFER	0.00	0.00	0.000	0.000
OVERALL	62.00	52.00	195.195	3.753

********** END OF TRANSCRIPT **********

WAKE FOREST UNIVERSITY CEEB Code = 5885 FICE Code = 002978 Email: registrar@wfu.edu Website: registrar.wfu.edu Phone: (336) 758-5207 Fax: (336) 758-6056
For questions or further information, contact the Office of the University Registrar at PO Box 7207, Winston-Salem, NC 27109. The Office of the University Registrar issues official transcripts for all Undergraduates and the Graduate, Divinity and Business Schools.

VALUE SYSTEM

From Fall 1975 to Summer 2001, the undergraduate school awarded course credits. Credits may be converted into conventional semester hours by multiplying the assigned credits by 0.9 (i.e., 4 credits= 3.6 semester hours). Students matriculating in the undergraduate schools beginning in Fall 2001 receive semester hours. The Graduate and Divinity Schools award conventional semester hours.

After Fall of 1998, the undergraduate and graduate schools changed to a plus/minus grading scale. At that time, the Graduate School also changed from a 3.00 point scale to a 4.00 point scale. Graduate students who matriculated before Fall 1998 but were still enrolled as of Fall 1998 had all earlier grades converted to the 4.00 point scale.

TRANSFER CREDITS

Transfer credit may be counted toward the graduation requirements, but grades earned in the transfer course are not used in calculating the Wake Forest grade point average. The grades appearing on the Wake Forest transcript are the actual grades earned, but the units shown are only those accepted for transfer by Wake Forest.

Departmental abbreviations are listed in the Bulletins. Some courses transferred from other institutions may have abbreviations not found in the Bulletin.

Repeated courses are flagged I (included in GPA) or E (excluded in GPA). For classes taken and repeated at Wake Forest, only one grade remains in the cumulative grade point average, based on Bulletin regulations.

DEFINITION OF GRADES AND GRADE POINT VALUES

UNDERGRADUATE

Calculated in grade point average:

Grade	Definition	Points
A	Exceptionally high achievement	4.00
A-		3.67
B+		3.33
B	Superior	3.00
B-		2.67
C+		2.33
C	Satisfactory	2.00
C-		1.67
D+		1.33
D		1.00
D-	Passing but unsatisfactory	.67
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00
WF	Withdrawn Failing	.00
F.	Irreplaceable F	.00

Not calculated in grade point average:

EX	Exemption
P	Passing
FPF	Failure in Pass/Fail grade mode
IPF	Incomplete in Pass/Fail grade mode
NRPF	Not reported in Pass/Fail grade mode
AU	Audit
DR	Official drop approved by the Dean
NC	Non-credit non-graded course
WD	Withdrawal from the university
T (grade)	Transfer Credit
TNS	Dual-Enrollment Transfer Credit
W	Course Withdrawal

DIVINITY

Calculated in grade point average:

Grade	Definition	Points
A	Excellent	4.00
A-		3.67
B+		3.33
B	Commendable	3.00
B-		2.67
C+		2.33
C	Satisfactory	2.00
C-		1.67
D	Unsatisfactory	1.00
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00
WF	Withdrawn Failing	.00
F.	Irreplaceable F	.00

Not calculated in grade point average:

P	Passing
FPF	Failure in Pass/Fail mode
IPF	Incomplete in Pass/Fail mode
NRPF	Not reported in Pass/Fail mode
AUD	Audit
DR	Official drop approved by Dean
WD	Withdrawal from the university
WP	Withdrawal Passing

GRADUATE

Starting with the fall 1997 semester, graduate level courses changed from 300, 400, and 500 level courses to the current 600, 700, and 800 level courses.

System Prior to Summer 1998

Calculated in grade point average:

Grade	Points per Hour
A	3.00
B	2.00
C	1.00
F	0.00

Not calculated in grade point average:

Grade	Definition
P	Passing
F	Failure in Pass/Fail mode
NR	Not reported in Satisfactory/Unsatisfactory mode
I	Incomplete in Satisfactory/Unsatisfactory mode
S	Satisfactory
U	Unsatisfactory
AUD	Audit
DRP	Drop approved by the Dean after regular drop period
NC	Non-credit non-grade courses
WP	Withdraw Passing
WF	Withdraw Failing

System after Summer 1998

Calculated in grade point average:

Grade	Definition	Points
A	Excellent	4.00
A-		3.67
B+		3.33
B	Good	3.00
B-		2.67
C+		2.33
C	Low Passing	2.00
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00

Not calculated in grade point average:

ISU	Incomplete in Satisfactory/Unsatisfactory grade mode
P	Passing
FPF	Failure in Pass/Fail grade mode
IPF	Incomplete in Pass/Fail grade mode
NRPF	Not reported in Pass/Fail grade mode
NR	Not reported in Satisfactory/Unsatisfactory mode
S	Satisfactory
U	Unsatisfactory
AU	Audit
DR	Official drop approved by Dean
NC	Non-credit non-grade course
WD	Withdrawal from the University
WF	Withdrawal Failing
WP	Withdrawal Passing

LAW

COURSE NUMBER SYSTEM: Courses numbered 100-199 are required first-year courses. Courses numbered 200-899 are upper-level required and/or elective courses. Accepted transfer credits may be numbered 900-999, unnumbered and indicated as such, or Wake Forest equivalent courses.

Calculated in grade point average:

Grade	
A+	4.00
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
C-	1.67
D+	1.33
D	1.00
D-	0.67
F	0.00

Not calculated in grade point average:

H	Honors
P	Pass
LP	Low Pass
FPF	Failure in Pass/Fail grade mode
AU	Audit
I	Incomplete
NC	No Credit
S	Satisfied
TR	Transfer Credit Accepted
W	Withdrew from Course
WD	Withdrew from School

GRADE SUFFIX: V Waived; X Course not calculated in GPA; * Grade not calculated in GPA, credit earned only.

For classes graduating prior to 2019, see: http://registrar.law.wfu.edu/policies/.

BUSINESS (Graduate)

Students who began the program prior to July 2009, are graded on a 9-point grading system. Students admitted after that date are graded on a 4-point grading system.

Calculated in grade point average:

4 Point Grading System:

Grade	Points
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
F	.00

Not calculated in grade point average:

I	Incomplete
P	Pass/Fail Course
AU	Audit
WD	Withdrawn from the University
WP	Withdrawn passing from a course
WF	Withdrawn failing from a course
E	Exempt from a course
T	Course transfer
X	Course waived

9 Point Grading System:

Grade	Points
A+	9
A	8
A-	7
B+	6
B	5
B-	4
C+	3
C	2
C-	1

PROFESSIONAL STUDIES

Calculated in grade point average:

Grade	Points
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
F	.00

Not calculated in grade point average:

I	Incomplete
WD	Withdrawn
WF	Withdrawn Failing
T	Transfer

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I understand that Nathaniel C. Drum is applying for a clerkship position with your Court. Please know that last spring I had the pleasure of having Nate in my trade secrets and unfair competition course at the Wake Forest University School of Law, and that I highly recommend him for the job.

When I teach trade secrets and unfair competition law, I do so as an adjunct professor whose primary vocation is a labor and employment defense attorney. Therefore, I come to the class with a critical eye toward the practical as well as the academic, while holding my students to a high standard of preparation and performance. Nate demonstrated excellent skills in both, as he was always prepared for our weekly class readings, presented thoughtful questions and insights during class discussions, and showed an ability to quickly recognize the key facts and law at issue in a matter. In addition, he not only received the top grade, which is never an easy task given the comprehensiveness of my exams, but frankly had one of the best final exams of any student since I first started teaching the class 20 years ago.

It's also worth noting that I challenge my students with not just reading and understanding case law and statutes, but also with interpreting and applying that law to factual patterns they'll likely encounter during their future legal practice and which demand quick, alternative thinking. Nate was always prepared and contributed in meaningful ways to that discussion, showing an innate ability to assess and analyze situations for advising "clients" with options and recommended approaches. As you can probably imagine, those traits contributed greatly to his performing so well on our class essay and short answer final exam, which combined with his excellent writing abilities, outstanding grades, honors such as being named to the Pro Bono Honor Society and chosen as a staff editor of the Wake Forest Law Review, and numerous meaningful extracurricular activities, should also make him a valuable addition to your Court.

Unrelated to my trade secrets course, let me also say that I had the pleasure of "judging" a practice session for the law school's National Mock Trial Team on which Nate was a captain. During that pre-competition session before a mock jury, Nate demonstrated excellent skills in translating legal concepts into practical understanding, while presenting a cohesive case theme and theory through focused witness examinations, properly admitting and objecting to exhibits and testimony being offered into evidence, and making persuasive oral arguments. All the while navigating multiple procedural and evidentiary issues that could significantly affect trial strategy and what the jury might consider in reaching a verdict, and which could quite frequently be encountered in cases before your Court.

On top of this, Nate is simply a pleasure to be around. He works hard, but even more appears to enjoy the hard work and is quite respectful and friendly in the process. If this is also what you're looking for in a clerk – which, by the way, is always at the top of my list in hiring for our law firm – then I would add that as well to my strong recommendation for offering Nathaniel C. Drum a federal clerkship.

Please let me know if you have any questions concerning this letter, or if you would like to discuss Nate's application any further. With highest regards, I remain

Very truly yours,

Kenneth P. Carlson, Jr.

Kenneth Carlson - kcarlson@constangy.com - 3367216843

WAKE FOREST UNIVERSITY
SCHOOL of LAW

TIMOTHY DAVIS
John W. & Ruth H. Turnage
Professor of Law
E-mail: davistx@wfu.edu
Phone: (336) 758-3670
Fax: (336) 758-4496

Re: Nathaniel C. Drum

Dear Judge:

It is with great pleasure that I recommend Nathaniel Drum for a law clerk position. Nate was a student in my Contracts I and II classes and I am comfortable commenting on his potential as a law clerk.

Nate is among a select group of students who have the range of abilities and personality traits that mark them as special. I vividly recall taking notice of Nate during the first week of Contracts I classes. Nate asked a question that demonstrated intellectual depth and curiosity. Based on additional exchanges, I formed the impression of a young man who possesses tremendous potential and the intangibles that will enable him to have a successful legal career.

Nate's performance during his first year of law school confirmed my initial observations of him. Whether in the context of class-related academic performance (Nate is in the top 9% of his class and received the second is highest grades in my Contracts I & II), law review or co-chair of the First-Generation Law Society, Nate has set himself apart through his fine mind, mental agility, and his commitment to excellence, and service. Moreover, Nate is a well-balanced young man. He is respectful, pleasant, and possesses a delightful sense of humor. Nate's values and maturity also are such that if he is afforded the opportunity to clerk, he will act in a professional and confidential manner.

I recommend Nate to you with enthusiasm and would be pleased to discuss his qualifications to serve as your law clerk. My telephone number is 336-758-3670.

Sincerely,

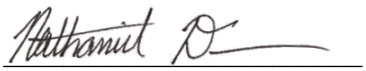
Timothy Davis
John W. & Ruth H. Turnage
Professor of Law

Writing Sample

Below is an excerpt from a draft memorandum order and opinion which was prepared as part of my elective legal analysis, writing, and research (LAWR IV) class, Writing for Judicial Chambers.

The assignment required that I review a pending Motion to Transfer Venue in the case of *United States v. Oliveras*, 1:21-cr-00738 (D.D.C.) before Judge Beryl A. Howell. I was then provided with a brief, fictitious, email from Judge Howell instructing that I draft a memorandum order and opinion denying the motion.

As part of a written assignment for a course grade, I hereby certify that I received no assistance in drafting the memorandum and that the writing sample below has been unedited by others.



MEMORANDUM ORDER & OPINION

Defendant Michael Oliveras ("Oliveras") is charged with four misdemeanors stemming from his alleged conduct at the U.S. Capitol on January 6, 2021. Specifically, Oliveras is charged with: (1) entering and remaining in a restricted building or grounds in violation of 18 U.S.C. § 1752(a)(1); (2) disorderly and disruptive conduct in a restricted building or grounds in violation of 18 U.S.C. § 1752(a)(2); (3) disorderly conduct in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(D); and (4) parading, demonstrating, or picketing in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(G). Currently pending before this Court is Defendant's Motion for Transfer of Venue ("Def.'s Mot."), ECF No. 36, filed on November 3, 2022.

Oliveras asserts two bases for his Motion: (1) that pursuant to Fed. R. Crim. P. 21(a), this Court should transfer his case for prejudice; and (2) that pursuant to Fed. R. Crim. P. 21(b), this Court should transfer his case for convenience. *Id.*

As explained below, these arguments are without merit. Therefore, this Court joins every other Judge on this Court to have considered—and consistently rejected—these arguments from defendants charged for their conduct relating to the events of January 6, 2021. Accordingly, the Motion is denied.

I. DISCUSSION

Oliveras first argues that this Court must grant the Motion and transfer his case to the District of New Jersey because community hostility, primarily driven by media coverage of the events of January 6, 2021, has created a presumption of juror prejudice, making it impossible for him to receive a fair and impartial trial in the District of Columbia ("the District"). *Id.* at 1-7. Oliveras then argues that this Court should exercise its discretion and grant the Motion "for convenience." *Id.* at 8-13.

A. Transfer for prejudice, pursuant to Fed. R. Crim. P. 21(a), is unwarranted.

Oliveras argues that community hostility surrounding this case is so severe that this Court should presume juror prejudice, without conducting voir dire, thus requiring that this case be transferred. Specifically, Oliveras argues that the size and characteristics of Washington, D.C., when combined with the ongoing negative media coverage of the events of January 6, 2021, make it impossible for him to receive a fair and impartial trial.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. The right to an impartial jury does not necessitate that "jurors be totally ignorant of the facts and issues involved." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961); *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) (observing that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."). Rather, the Sixth Amendment protects the "right to be tried by jurors who are capable of putting aside their [pre-existing] personal impressions and opinions and rendering a verdict based solely on the evidence presented in court." *United States v. Orenuga*, 430 F.3d 1158, 1162 (D.C. Cir. 2005). Nonetheless, when "the court is satisfied that so great a prejudice against the defendant exists in the [] district that the defendant cannot obtain a fair and impartial trial," the court is compelled to transfer the case to another district. Fed. R. Crim. P. 21(a). Such transfers are a "basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955).

"[A] 'thorough examination of jurors on voir dire' is the most important tool for ensuring that a defendant receives a fair and unbiased jury." *United States v. Garcia*, No. 21-0129 (ABJ), 2022 WL 2904352, at *5 (D.D.C. Jul. 22, 2022) (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976)). Without conducting a thorough voir dire to determine the "what the prospective juror has read and heard about the case and how his exposure has affected his

attitude towards the trial," *United States v. Haldeman*, 559 F.2d 31, 69 (D.C. Cir. 1976), "a presumption of prejudice . . . attends only the extreme case." *Skilling v. United States*, 56 U.S. 358, 381 (2010). In considering whether to presume prejudice, the Supreme Court in *Skilling* identified three factors for courts to consider: (1) the size and characteristics of the jury pool; (2) the type of information included in the media coverage; and (3) the time period between the arrest and trial, as it relates to the attenuation of the media coverage. *Skilling*, 56 U.S. at 378.

1. The size and characteristics of the District's jury pool do not support a finding of prejudice.

With regard to the first *Skilling* factor, the size and characteristics of the jury pool, Oliveras argues that it weighs in favor of transfer because: (1) a large proportion of the District's jury pool works for the federal government or have close connections to those who do; (2) even those who are unrelated to federal government employees were likely traumatized due to the events of January 6, 2021; and (3) a supermajority of District residents voted for President Joseph Biden during the 2020 election. Def.'s Mot. at 4-7. As explained below, these arguments are without merit.

Oliveras relies extensively on *Rideau v. Louisiana* to support his argument that the size and characteristics of the District support transferring venue. 373 U.S. 723 (1963). However, *Rideau* is clearly distinguishable from the case at bar. In *Rideau*, the defendant was charged with armed robbery, kidnapping, and murder in the Calcasieu Parish of Louisiana. *Id.* at 723-24. After his arrest, a video and audio recording of the defendant's confession was broadcast on local news stations. *Id.* at 724. The recording was played three times over a period of days in which each broadcast was watched by audiences ranging from 24,000 to 53,000 people. *Id*. The parish was only home to a total of 150,000 people. *Id*. Prior to trial, the defendant moved for a transfer of venue based on the widespread broadcast of his recorded confession. *Id.* at 724-25. The Supreme

Court held that the trial court erred and should have granted the defendant's motion to transfer venue. *Id.* at 727. It reasoned that the extreme circumstances of the case, including the large portion of the small parish who had been exposed to the videotaped confession, made it impossible for the defendant to receive a fair trial. *Id.* at 726-27. Specifically, the Court noted that examining the voir dire record was not necessary because the particular characteristics of the small parish and the widely circulated broadcast made it impossible for the defendant to empanel a jury "who had not seen and heard [his] televised [confession]." *Id.* at 727.

As has been recognized by other judges in this District, "Washington is hardly a one-stoplight village, and it is much larger than districts in the handful of cases in which prejudice has been presumed," such as in *Rideau*. *United States v. Ballenger*, No. 21-719 (JEB), 2022 WL 16533872, at *2 (D.D.C. Oct. 28, 2022); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (finding prejudice unlikely in a district smaller than this District); *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991) (refusing to presume prejudice in a district smaller than this District). Rather, "[g]iven [this District's] large, diverse pool of potential jurors, the suggestion that twelve impartial individuals could not be empaneled is hard to sustain." *Skilling*, 561 U.S. at 382.

Oliveras's first contention that "a huge proportion of the District of Columbia residents either work for the federal government themselves or have friends and family who do," while perhaps true, does not warrant a presumption of prejudice. Def.'s Mot. at 4. As the government notes in its opposition, "merely being employed by the federal government" does not inherently render a person incapable of serving as an impartial juror. Gov't's Opp'n Def.'s Mot. Transfer Venue (Gov't's Opp'n), ECF No. 42 at 3. While certainly numerous federal employees, such as the Capitol Police and Congressional staff, were impacted by the events of January 6, 2021, the

overwhelming majority were not. Further, as noted by the government, of the District's over 700,000 residents, more than 550,000 are not employed by the federal government. Gov't's Opp'n at 4. Therefore, even taking Oliveras's argument at face-value, that all federal government employees are irreparably prejudiced against him, the overwhelming majority of District residents do not fall within this category. Simply put, to presume that all federal employees, their friends, families, and neighbors, are incapable of impartiality in this case both wildly overestimates the direct impact of the January 6, 2021 events and underestimates the ability of District residents to serve impartially.

Oliveras's second contention that "even District residents that have no direct connection to the government reported feeling deeply traumatized by the events [of January 6, 2021]," again, while perhaps true, does not warrant a presumption of prejudice. Def.'s Mot. at 5. Oliveras notes that the Mayor's declaration of a state of emergency, implementation of a city-wide curfew, restricted access to public transportation, and advisories not to attend the presidential inauguration, contributes to the District's collective prejudice. *Id.* at 4-5. However, as noted by the Court in *Skilling*, "[a]lthough widespread community impact necessitated careful identification and inspection of prospective jurors' connection" to the subject-matter of the litigation, "voir dire was 'well suited to that task.'" *Skilling*, 561 U.S. at 384. Again, while it may be true that many of the District's residents were, in some small way, impacted by the events of January 6, 2021, such attenuated connections are insufficient to support a presumption of prejudice. Of the 700,000 potential jurors residing in the District, their experiences surrounding the events of January 6, 2021 are unique and varied, and thus, an appropriate subject to inquiry during voir dire.

Oliveras's third contention that "an overwhelming number of District of Columbia residents . . . voted for President Biden" again, while perhaps true, does not warrant a presumption of prejudice. Def.'s Mot. at 7. "A community's voting patterns" are irrelevant to the consideration of a motion to transfer venue. *Haldeman*, 559 F.2d at 277, n. 43. (affirming the denial of a motion to transfer venue from the District of Columbia for a prosecution related to the Watergate political scandal during the Nixon administration when approximately eighty percent of District voters had voted for the Democratic Party's candidate in the prior two elections). As noted by the court in *Haldeman*, any personal opinions, beliefs, or values which are attributable to a political affiliation and which might interfere with the juror's ability to be impartial is a subject to be examined through voir dire. To hold that a membership in a certain political party, or voting for a certain political party's candidates, is worthy of a presumption of prejudice would be dangerous and have far reaching implications. Doing so would effectively require that any democratic voter in a republican district, or republican voter in a democratic district would be entitled to a transfer of venue. This Court declines to take such a radical position.

Having considered and rejected Oliveras's arguments, the first *Skilling* factor does not weigh in favor of transferring venue.

2. The type of information contained in media reports surrounding the events of January 6th do not support a finding of prejudice.

With regard to the second *Skilling* factor, the type of information included in media coverage, Oliveras argues that this factor weighs in favor of transfer because: (1) the language utilized in news coverage has been "especially charged and inflammatory;" (2) many media reports have been factually inaccurate; (3) the media coverage has been so pervasive within the District; and (4) the media has reported on the decisions and comments of judges on this Court. Def.'s Mot. at 10-12. As explained below, these arguments are without merit.

"[C]ourts have declined to transfer venue in some of the most high-profile prosecutions in recent American history." *See In re Tsarnaev*, 780 F.2d 14, 15 (1st Cir. 2015) (declined to transfer venue from the District of Massachusetts for the accused Boston Marathon bomber); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (declined to transfer venue from the Southern District of New York for an accused accomplice in the 1993 terrorist attack on the World Trade Center); *United States v. Moussaoui*, 43 F. App'x 612, 613 (4th Cir. 2002) (declined to transfer venue from the Eastern District of Virginia for an accused accomplice in the September 11, 2001 terrorist attacks on the Pentagon building). "The mere existence of intense pretrial publicity is not enough to make a trial unfair, nor is the fact that potential jurors have been exposed to this publicity." *United States v. Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995).

Oliveras's first contention that "[t]he language used in media coverage . . . has been especially charged and inflammatory," does not warrant a presumption of prejudice. Def.'s Mot. at 10. As numerous courts have held, news stories that are "pervasive, adverse," *Sklling*, 561 U.S. at 381-84, and "hostile in tone and accusatory in content," *Haldeman*, 559 F.2d at 61, do not compel a presumption of prejudice. Oliveras has failed to identify with particularly any of the "vivid, unforgettable information" that the *Skilling* court considered as "particularly likely to produce prejudice" in the minds of potential jurors. *Skilling*, 561 U.S. at 384. Moreover, Oliveras has failed to identify any media coverage which has mentioned him by name or which has particularly identified and discussed his involvement in the January 6, 2021 events. *See Skilling*, 561 U.S. at 384, n. 17. (holding that "when publicity is about the event, rather than directed at the individual defendants, this may lessen any prejudicial impact.") While it is certainly expected that news coverage of the January 6, 2021 events would be negative, such negativity does not rise to a level which compels a presumption of prejudice.

Oliveras's second contention that "much early reporting has since been shown to be factually inaccurate" does not warrant a presumption of prejudice. Def.'s Mot. at 11. To the extent that the information with which Oliveras is concerned is relevant to the proceeding, such facts will need to be borne out by the jury. However, to the extent that the facts with which Oliveras is concerned are not relevant to the proceeding, such as Officer Brian Sicknick's cause of death, such facts will not be introduced at trial for the jury's consideration. As with many of Oliveras's contentions, to the extent that these reporting inaccuracies would impair an individual juror's ability to remain impartial is a matter to be explored during voir dire.

Oliveras's third contention that the news coverage of the January 6, 2021 events in the District "is so substantial that it would be surprising to identify any potential jurors who have not been exposed to the coverage" does not warrant a presumption of prejudice. Def.'s Mot. at 11-12. As noted above, potential jurors need not be totally ignorant of the facts of a case, they only need to be able to put aside their preexisting perceptions and reach a verdict based upon the evidence alone. Further, much of the January 6, 2021 media coverage has been nationwide in scope and not limited to the District. Oliveras has failed to show how the national coverage of the January 6, 2021 events would have any lesser impact on the residents of the District of New Jersey.

Oliveras's fourth contention that "the media has widely reported comments of U.S. District Court Judges in this District regarding the events of January 6," does not warrant a presumption of prejudice. Def.'s Mot. at 12. However, like media coverage, comments made by political leaders and judges, while perhaps inadvisable, "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 561 U.S. at 382. To the extent that any potential jurors recall any

comments from Judges on this Court, this can be explored during voir dire to determine any prejudicial impact.

Having considered and rejected Oliveras's arguments, the second *Skilling* factor does not weigh in favor of transferring venue.

3. The relationship between the media coverage and time since Oliveras's arrest and scheduled trial do not support a finding of prejudice.

With regard to the third *Skilling* factor, the time period between the arrest and trial, as it relates to the media coverage, Oliveras argues that this factor weighs in favor of transfer because news coverage has remained high, despite the twenty-two months since the events of January 6, 2021. Def.'s Mot. at 13. As explained below, this argument is without merit.

"[P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Neb. Press Ass'n*, 427 U.S. at 565. Over two years has passed since the events of January 6, 2021. It is true that Congressional hearings, midterm elections, and continued media coverage have kept the topic of January 6, 2021 fresh in the minds of citizens. However, as noted above, such events have been covered nationally, not localized to the District. Rather, Oliveras's own Exhibit support this conclusion by showing that media stories and news outlets have continued to decrease the amount of time and resources dedicated to covering the events of January 6, 2021. As noted by *Skilling*, a reduced "decibel level of media attention" is a factor demonstrating a reduced likelihood of juror prejudice. At most, other judges in this District considering this factor have held it as being in equipoise.

In considering Oliveras's argument, the third *Skilling* factor is in equipoise.

When weighing the three *Skilling* factors, none favor transferring venue to the District of New Jersey. Because Oliveras has failed to demonstrate a presumption of prejudice on the part of potential District jurors, his motion to transfer venue "for prejudice" is denied.

"'[A]dequate voir dire to identify unqualified jurors' is the primary safeguard against jury prejudice." *United States v. Ballenger*, No. 21-719 (JEB), 2022 WL 16533872, at *1 (D.D.C. Oct. 28, 2022) (quoting *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)). Therefore, courts are given "ample discretion in determining how best to conduct [] voir dire," *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981), including the "mode and manner of [the] proceeding" and "the range of questions to be asked to prospective jurors," *United States v. Robinson*, 475 F.2d 376, 380 (D.C. Cir. 1973). If, as Oliveras suggests, the venire has become so prejudiced against the defendant that "an impartial jury actually cannot be selected, that fact should become evident at the voir dire." *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976).

At this stage of the proceeding, Oliveras has failed to demonstrate the existence of prejudice which would require transfer under Fed. R. Crim. P. 21(a). However, pursuant to his Sixth Amendment rights, Oliveras will be granted a full and fair opportunity to expose any bias or prejudice on the part of the veniremen through voir dire.

Applicant Details

First Name	**Emily**
Last Name	**DuChene**
Citizenship Status	**U. S. Citizen**
Email Address	**emduch@umich.edu**
Address	**Address** Street **11 Hunter Drive** City **Hampton** State/Territory **New Hampshire** Zip **03842** Country **United States**
Contact Phone Number	**9783873994**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 6, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Michigan Journal of Law Reform**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Henry M. Campbell Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

McQuade, Barbara
bmcquade@umich.edu
734-763-3813
Fasman, Zachary
zfasman@umich.edu
Kalil, Danielle
dkalil@umich.edu
Logue, Kyle
klogue@umich.edu
734-936-2207

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am a rising third-year law student at the University of Michigan Law School. I am spending the summer working in the New York City office of Debevoise & Plimpton. My older sister and her husband live in Virginia, and I would relish the opportunity to begin my legal career in the state close to family.

Last summer, I interned in the U.S. District Court in D.C. with Magistrate Judge Zia M. Faruqui. Through this experience, I strengthened my legal research and writing skills and confirmed my desire to pursue a career as a litigator. I drafted legal memoranda regarding Social Security Benefits and FOIA requests, observed Judge Faruqui during court proceedings, and learned how to work effectively on a team in a fast-paced legal environment. I was able to translate the skills I developed during this internship into a brief that I wrote and argued in front of a panel of judges during my law school's moot court competition. As a law clerk, I hope to continue developing my legal skills and contribute to your chambers in a unique and meaningful way.

Before law school, I worked for two years with Teach for America as a 7th grade English teacher in an underserved Brooklyn community. I learned how to distill complex information in a simple way for a large audience and how to think on my feet while presenting. As a teacher in a global pandemic, I also learned how to lead in the face of uncertainty and how to keep students and their families engaged in an entirely virtual environment to ensure positive outcomes. These skills have proven invaluable as a law student when working on complex cases with other student attorneys in the Human Trafficking Clinic. I was able to work with my client from a place of empathy and understanding, while fighting hard to meet the needs of the case and being creative when faced with obstacles. As a law clerk in your chambers, I am excited and confident in my ability to apply these skills to the fast-paced and demanding environment of the courthouse.

I have uploaded my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following professors are also attached:
• Professor Zachary Fasman: zfasman@umich.edu, 917-562-3570
• Professor Kyle Logue: klogue@umich.edu, 734-936-2207
• Professor Barbara McQuade: bmcquade@umich.edu, 734-763-3813
• Professor Danielle Kalil: dkalil@umich.edu, 734-615-3600

Thank you for your time and consideration.

Sincerely,

Emily DuChene

Emily DuChene

11 Hunter Drive, Hampton, NH 03842
(978) 387-3994 • emduch@umich.edu
She/Her/Hers

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor GPA: 3.812 — Expected May 2024
Journal: *Michigan Journal of Law Reform*, Articles Editor
Activities: If/When/How – *Former Treasurer*, Campbell Moot Court Competition – *Competitor,* Street Law – *Former 1L Representative*, Outlaws – *Member*, Women in Law Society – *Member*

RELAY GRADUATE SCHOOL OF EDUCATION — New York, NY
Master of Arts, Teaching — June 2021
Honors: Distinction, Dean's List, Academic Honors

UNIVERSITY OF MICHIGAN — Ann Arbor, MI
Bachelor of Arts in Political Science & Psychology, Minor in Judaic Studies — May 2019
Honors: Phi Beta Kappa, James B. Angell Scholar, University Honors
Activities: Michigan in Washington, Kappa Alpha Pi Prelaw Fraternity, WeRead Volunteer, Delta Gamma

EXPERIENCE

DEBEVOISE & PLIMPTON LLP — New York, NY
Summer Associate — May 2023 – Present

HUMAN TRAFFICKING CLINIC, UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Student Attorney — January 2023 – Present

- Research and write memoranda regarding U-Visas, T-Visas, and Green Card applications.
- Assist clients with Green Card application process, including compiling documentation, writing affidavits, and communicating with caseworkers and other professionals.
- Devise strategies to assist a client who resides out of state and speaks a language other than English.

U.S. DISTRICT COURT MAGISTRATE JUDGE ZIA M. FARUQUI — Washington, D.C.
Judicial Intern — May 2022 – July 2022

- Researched and drafted legal memoranda and draft opinions about Social Security disability benefits.
- Prepared draft Report and Recommendation for review by Federal Judge.
- Observed court proceedings and discussed case strategy with Judge Faruqui and law clerks regarding criminal and civil cases.

EXCEED UPPER CHARTER SCHOOL — Brooklyn, NY
7th Grade English Language Arts Teacher — August 2019 – June 2021

- Designed and taught interactive, learner-focused lesson plans aligned with New York state standards.
- Increased students' reading and comprehension skills by adapting lessons to meet students' needs, using data to identify gaps, and re-teaching materials tailored to students' misconceptions.
- Led and participated in weekly training and coaching sessions to practice pedagogical skills and receive feedback, using that feedback to hone teaching methods further.

TEACH FOR AMERICA — New York, NY
Corps Member — June 2019 – June 2021

ADDITIONAL

Interests: Scuba (PADI certified), dachshunds, watching each year's Oscar-nominated movies

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: DuChene,Emily C
Student#: 88381211

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	510	003	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	A-
LAW	530	002	Criminal Law	Barbara Mcquade	4.00	4.00	4.00	A
LAW	580	003	Torts	Kyle Logue	4.00	4.00	4.00	A-
LAW	593	009	Legal Practice Skills I	Jessica Lefort	2.00		2.00	S
LAW	598	009	Legal Pract:Writing & Analysis	Jessica Lefort	1.00		1.00	S
Term Total				**GPA: 3.800**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.800**		**12.00**	**15.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	520	003	Contracts	Kristina Daugirdas	4.00	4.00	4.00	A-
LAW	540	003	Introduction to Constitutional Law	Don Herzog	4.00	4.00	4.00	B+
LAW	594	009	Legal Practice Skills II	Jessica Lefort	2.00		2.00	S
LAW	673	001	Family Law	Tracy Van den Bergh	3.00	3.00	3.00	A
Term Total				**GPA: 3.636**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.721**		**23.00**	**28.00**	
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00	4.00	4.00	A-
LAW	612	002	Alternative Dispute Resolution	Allyn Kantor	3.00	3.00	3.00	A
LAW	653	001	Employment Discrimination	Zachary Fasman	4.00	4.00	4.00	A
LAW	858	001	Legal Risk Management	Teresa Sebastian	2.00	2.00	2.00	A-
LAW	900	393	Research	Patrick Barry	1.00		1.00	S
Term Total				**GPA: 3.861**	**14.00**	**13.00**	**14.00**	
Cumulative Total				**GPA: 3.772**		**36.00**	**42.00**	

Continued next page >

Control No: E196888201 Issue Date: 06/05/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: DuChene,Emily C
Student#: 88381211

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	669	002	Evidence	Len Niehoff	4.00	4.00	4.00	A-
LAW	797	002	Model Rules and Beyond	Bob Hirshon	3.00	3.00	3.00	A
LAW	951	001	Human Trafficking Clinic + Lab	Bridgette Carr Chavi Nana Courtney Petersen Danielle Kalil	4.00	4.00	4.00	A
LAW	954	001	Human Trafficking Clnc+Lab Sem	Bridgette Carr Chavi Nana Courtney Petersen Danielle Kalil	3.00	3.00	3.00	A
LAW	999	319	Directed Reading	Stephen Sanders	1.00		1.00	S
Term Total				**GPA: 3.914**	**15.00**	**14.00**	**15.00**	
Cumulative Total				**GPA: 3.812**		**50.00**	**57.00**	
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:		06/05/2023						
LAW	617	001	Anatomy of a Commercial Trial	Norman Ankers	3.00			
LAW	675	001	Federal Antitrust	Daniel Crane	3.00			
LAW	681	001	First Amendment	Don Herzog	4.00			
LAW	742	001	Film Law	Paul Szynol	3.00			
LAW	810	001	Corp Social Resp: Reg&Crim App	Chavi Nana	2.00			

End of Transcript
Total Number of Pages 2

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

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UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

Barbara L. McQuade
Professor from Practice

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Emily DuChene for a clerkship in your chambers. Emily recently completed her second year at Michigan Law School, where she serves as articles editor for the Michigan Journal of Law Reform. Emily is a former teacher who wants to continue her public service as as a litigator. Her teaching experience gives her a rare combination of empathy and toughness that will make her an excellent lawyer.

I had the pleasure of getting to know Emily as a student in my first year Criminal Law class. Emily's performance in that class was impressive, earning one of only a few A's awarded in the course. She consistently showed a deep understanding of the concepts and a fluid ability to analyze legal problems. Emily is a strong writer who can clearly dissect legal issues.

Last summer, Emily interned in the chambers of a U.S. magistrate judge in Washington D.C., an experience that give her an understanding of the work of a court and inspired her to serve as a law clerk. Before coming to law school, Emily earned a Master's Degree in teaching and worked as a seventh grade language arts teacher at an under-resourced public school in Brooklyn. Teaching in that environment provided Emily with the kind of humility and resilience that will help her excel as a lawyer.

I previously served as U.S. Attorney for the Eastern District of Michigan. In that role, I had the opportunity to hire more than 60 lawyers, and Emily has the kinds of qualities that I would look for in a new hire. She is smart, she works well with others, and she can communicate effectively. These qualities will make Emily a valuable resource as a law clerk.

I know from my own experience as a law clerk that a judge's chambers can be like a family, so it is important to bring in clerks who will add value, respect confidences, and perform every task with enthusiasm and excellence. I think Emily will thrive in this setting. She has the intellectual horsepower to capably handle the work and she will be a delightful addition to the workplace.

For all of these reasons, I enthusiastically recommend Emily DuChene for a clerkship in your chambers. Please let me know if I can provide any additional information.

Sincerely,

Barbara L. McQuade

Barbara McQuade - bmcquade@umich.edu - 734-763-3813

UNIVERSITY OF MICHIGAN LAW
625 South State Street
Ann Arbor, MI 48109

Zachary D. Fasman
Lecturer
zfasman@umich.edu
(917) 562-3570

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to write on behalf of Emily Duchene, a forthcoming May 2024 graduate of Michigan Law who is applying for a clerkship in your chambers. Emily is an outstanding person who is among our very best students. She has received straight A's in Law School with the exception of one B+, and this was also the case in her undergraduate work at Michigan, where she had a 3.96 GPA. She is an Articles Editor of the Michigan Journal of Law Reform and a gifted student.

Emily was in my Employment Discrimination Law class in the fall 2022 semester, a 4-credit course with extensive readings in a rapidly developing field. Emily was engaged throughout, always completely prepared, offered thoughtful and insightful comments in class on difficult issues and of course wrote an excellent final exam. I spent a good deal of time with Emily during office hours, after class and before the final examination, when she and a classmate and I spent several hours going over some of the more difficult areas in the law. Throughout our discussions Emily demonstrated a clear understanding of employment discrimination and showed an ability to grasp challenging concepts well beyond her years.

If I were a judge, Emily is precisely the person whom I would be looking to hire. I write enthusiastically on her behalf because of her intellect, energy, good judgment, and respect for documentation and the craft of our profession. She combines these qualities with a warm, engaging personality.

She deserves an excellent clerkship and I very much hope you will hire her.

If you wish to discuss Emily's file, please do not hesitate to contact me.

Sincerely,

Zachary Fasman

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Emily DuChene

Dear Judge Walker:

As a professor in the Human Trafficking Clinic + Lab (HTC+L) at the University of Michigan Law School, I supervised Emily's work from January to May 2023. I had the opportunity to observe her performance each week in seminar classes, weekly supervision, and many informal contacts. As a student attorney in the HTC+L, Emily's work encompassed direct client representation and systemic reform work. I supervised her client work, which consistently exhibited professionalism, self-direction, organization, and strong research and writing. I have no doubt Emily would be a valuable addition to your chambers and highly recommend her for a clerkship.

Emily's strong research and analytical skills allowed her to grasp complicated legal concepts quickly. Emily's casework was focused primarily on immigration. Although she entered the clinic with limited knowledge of immigration law, her thorough research and strong work ethic allowed her to quickly learn the complexities and distill them in a way that was easy for a client to understand. For example, she had to answer a question about whether her client's conduct would bar her from eligibility for immigration status. This question was both factually and legally complex. Emily quickly got up to speed on the legal framework through independent research and engaged in thorough fact investigation to apply the facts to the law. She then used this research to guide her legal analysis and case strategy.

Emily's caseload required her to engage in various types of legal writing with strong attention to detail. This included drafting legal arguments detailing why her client was eligible for immigration relief and drafting an affidavit in her clients' voice that effectively conveyed her trafficking and immigration history. It also included memoranda to me about the results of her research as well as client letters clearly outlining legal options and next steps. Emily's writing was methodical, concise, well-structured, well-supported, and tailored to her audience.

Emily's attention to detail extended beyond her writing. She is extremely organized and excelled at case management but also exhibited flexibility. At the start of the semester, she researched every task that would need to be accomplished in her casework and created a detailed case plan, including a calendar for the remainder of the semester. She used this case plan to keep her work on track. However, when a client was unresponsive, delaying the timeline, Emily was able to revise and come up with a new plan without skipping a beat. In addition, Emily kept excellent records, maintained meticulous case files, and complied with all clinic policies and protocols.

Apparent in Emily's work was an ability to take initiative and solve problems effectively. She prepared thoroughly for each task. When she encountered an obstacle or question, Emily would not simply ask me what she should do. Rather, she would engage in independent research to understand the problem and identify solutions. She would then approach me with an explanation of the pros and cons of each option identified. She identified and asked good questions, but she was highly competent and able to work independently. She used my time and my knowledge as her supervisor effectively and efficiently.

Emily demonstrated professionalism and skilled communication. She represented a client with significant trauma who posed challenges with respect to client management and professional responsibility. This client was at times hostile and presented challenges even for me as a seasoned attorney. Emily engaged with this client with compassion, clarity, and creative problem solving. As with all her work, she approached communication with this client in a deliberate and thoughtful manner, going to great lengths to provide them with high quality legal representation. She tried to engage with the client in many different ways to see what would work best, even seeking ideas from classmates on how to approach the issue. Her client work also required her to communicate with other professionals, including court staff, case workers, and service providers. In all of her communication, she was clear, courteous, and had a good instinct for tailoring her message in a way her audience would understand.

Finally, Emily is a strong collaborator and a pleasure to work with. The HTC+L is very collaborative in nature and requires students to work not only with other law students but also with graduate students from other disciplines across the university. Emily and her casework partner did not know each other prior to clinic but quickly developed a great working relationship throughout the semester. This was due in part to Emily setting clear expectations, communicating regularly and respectfully with her partner, and contributing eagerly and equally to their workload. She regularly made meaningful contributions in our class sessions and was excited to help classmates work through challenges in their cases. Finally, Emily is personable and easy to get along with, and I looked forward to our interactions. She would be a joy to have in any office.

For all of these reasons, I believe Emily would make a valuable contribution to your chambers and recommend her to you without hesitation. Thank you for your time, and please feel free to contact my office with any questions about Emily.

Sincerely,

Danielle Kalil - dkalil@umich.edu

Danielle Kalil
Visiting Clinical Assistant Professor

Danielle Kalil - dkalil@umich.edu

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

Kyle D. Logue
Douglas A. Kahn Collegiate Professor of Law

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Emily Duchene, a second-year student at the University of Michigan Law School who is applying for a clerkship in your chambers. I am confident that Emily will be a fantastic law clerk. She is incredibly smart, has unlimited energy, and a contagious enthusiasm for the law.

Emily was a student in my torts class in the fall 2021 term, and, judging by her in-class participation and performance on the exam, she was easily among the two or three best students in that class. She was one of those front-row law students who devours everything the professor throws at her. On the first day of class she was the first student to be called on, and she set the tone for everyone else for the rest of the semester. She showed confidence, intelligence, good humor, and an extraordinary level of preparation. She kept this up for the rest of the semester as well. There was no one in that classroom who did more to contribute to the high level discussion that took place.

Her performance on the exam was also exceptional. Law school exams are designed to test not only knowledge of the material, but also the ability to write clearly and argue in a persuasive but balanced way for a particular legal position, citing the relevant authorities where appropriate and distinguishing the important cases that might seem to apply but don't. Emily's exam excelled along all of these dimensions. Her answers were sharp, and written in crystal clear prose. Her knowledge of the case law was exhaustive and subtle, which made it possible for her to apply the law to the facts in the questions with exceptional skill. Very few law students, even at Michigan, have Emily's analytical skills. It does not surprise me that her grade point average puts her among the best students in her law school class.

Emily's ability to excel in the classroom is made more impressive by the fact that she seems to be involved in every activity on campus. From her leadership position on the Michigan Journal of Law Reform (where she has the prestigious job of Articles Editor) to her active engagement in numerous student organizations (Street Law, Outlaw Women in Law Society), she has her hand (and often a leadership role) in a range of important work taking place on campus. All the while, she has been able to maintain a high level of academic excellence. This combination of accomplishment and involvement has been characteristic of her entire academic career—from her grad school days at the Relay Graduate School of Education to her undergrad career at the University of Michigan, where she was not only Phi Beta Kappa, but deeply involved in a panoply of campus activities. If there was any doubt about her commitment to hard work, notice that she was a corps member for Teach for America. I have had dozens of students who were involved in that program; all of them came away with a respect for the importance of working hard, even in difficult circumstances.

Finally, I would be negligent if I did not highlight Emily's sunny, cheerful personality. She is simply a pleasure to be around. She brightened our torts class with her wry, self-deprecating sense of humor, traits that seem to have made her very popular with, and respected by, all of her classmates.

In sum, Emily Duchene is almost an ideal clerkship candidate. There is literally no downside, and she has the potential to be one of your very best. If you have any questions about her, feel free to reach out to me by email or phone.

Sincerely yours,

Kyle Logue
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Emily DuChene

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She/Her/Hers

WRITING SAMPLE #1

The below writing sample is part of a brief written for the Fall 2022 University of Michigan Campbell Moot Court Competition. The beginning portion below is the statement of facts for the problem. And the argument that follows addresses the question of whether a dual-layer removal scheme for administrative law judges and Merit Systems Protection Board members violates the separation-of-powers doctrine. I was assigned the position I argued by the Campbell Moot Court Competition Board. This writing sample was lightly edited by my Campbell Moot Court partner who wrote the other half of the brief (not included below).

STATEMENT OF THE CASE

The 2008 financial crisis devastated the United States. Outdated and unenforced rules governing the financial sector allowed some to abuse the system at the expense of endangering the economy, eradicating trillions in wealth, and leaving millions of Americans without jobs. Congress reacted by passing the Dodd-Frank Act (also known as the Consumer Financial Protection Act of 2010 ("CFPA")), which, among other things, prohibits unfair, deceptive, or abusive acts and practices in the consumer-finance sector ("UDAAP"). 12 U.S.C. § 5536(a)(1)(B).

The CFPA also created the Consumer Financial Protection Bureau ("CFPB"), an independent regulatory agency tasked with enforcing federal consumer protection statutes that govern home financing, student loans, credit cards, and banking practices. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 112-203, 124 Stat. 1376 (2010). The CFPB is empowered to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, sue in federal court, and issue binding and enforceable decisions in administrative proceedings. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2193 (2020); *see also* §§ 5563-5564. The CFPB can seek restitution, disgorgement, injunctive relief, and civil penalties to remedy violations. §§ 5565(a); (c)(2).

The CFPB is required to adjudicate claims in accordance with the Administrative Procedure Act ("APA"). 5 U.S.C. § 5563(a). Administrative law judges ("ALJs") appointed under the APA are removable only for good cause "established and determined by the Merit Systems Protection Board" ("MSPB"). 5 U.S.C. § 7521(a). Members of the MSPB themselves may only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). The statutory scheme insulates the CFPB's ALJs from removal by the President at two distinct stages: (1) ALJs are removable only upon a finding by the MSPB of "good cause"; and (2) members of the MSPB are removable by the President only for inefficiency, neglect, or

malfeasance. *H.B. Sutherland Bank, N.A. v. Consumer Fin. Prot. Bureau,* 505 F.4th 1, 4 (12th Cir. 2022).[1]

In 2019, the CFPB brought an adjudication proceeding against H.B. Sutherland Bank, N.A. ("Sutherland or "the Bank") seeking civil penalties. In early 2020, the ALJ assigned to the matter issued a Recommended Decision, finding for the Bureau on each allegation and ordering that all sought relief be granted. The Bank appealed. In early 2021, the Director of the CFPB issued their Final Order, largely adopting the ALJ's Recommended Decision. The Director also issued an order denying the defendant's motion for a stay. The Bank filed a petition in the Court of Appeals seeking to set aside the Director's order pursuant to 12 U.S.C. § 5563. The Court of Appeals ruled for the Respondent and denied the Bank's petition for review. Petitioner then filed a writ of certiorari to the Supreme Court of the United States, which was granted.

Agency adjudication and assessment of a civil penalty under the CFPA do not implicate the Seventh Amendment right to a jury trial because the CFPA falls squarely within the public rights exception. Even in the absence of this exception, the claims arising from the CFPA still are not entitled to this right because the CFPA is not analogous to a common law claim or remedy as they existed when the Seventh Amendment was ratified.

The dual-layer removal scheme also does not violate the Constitution because ALJs serve an adjudicatory role that does not impede the President's ability to perform his constitutional duties. The scheme's constitutionality is supported by due process concerns and legislative history.

[1] These citations come from the mock opinion included in the competition materials.

A. The Dual-Layer Removal Scheme Does Not Violate the Constitution.

A. ALJs serve an adjudicatory role and thus the dual-cause removal system does not violate the separation of powers.

A statutory scheme with two layers of removal protections on ALJs does not violate the Constitution because ALJs serve an adjudicatory function. The scope of their duties does not involve policymaking or encroach on the President's ability to direct the activities of the executive branch. Thus, a dual-layer restriction on their removal does not violate the Constitution.

In *Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935), this Court held that the President has unrestricted power to remove those whose roles were exclusively executive, but this power does not extend to government officials whose functions are legislative and/or judicial in nature. At issue in *Humphrey's Executor* was whether the President had the power to remove a Federal Trade Commission ("FTC") commissioner. *Id.* at 612. This Court held that he did not because an FTC commissioner's functions are not purely executive in nature. *Id.* at 631-32. Rather, the FTC exercises quasi-legislative and quasi-judicial functions and thus must be free from executive control. *Id.* at 629-30. Congress has the authority to require such agencies to carry out their duties independent of executive control. *Id.*

Similarly, in *Morrison v. Olson*, 487 U.S. 654 (1988), this Court held that the President does not have the power to freely remove inferior officers. The Ethics in Government Act of 1978 permitted the judiciary to appoint independent counsel and gave the Attorney General sole removal power only for good cause. *Id.* at 660-61. Whether the President must have unfettered removal power depends on whether the officer is a "principal" or an "inferior" officer. *Id.* at 670-71. Because the Appointments Clause requires principal officers to be appointed by the President, they can also only be removed by the President. *Id.* And, because inferior officers can be appointed by the President, department heads, or the judiciary, they do not need to be removed by the President

and thus Congress is free to grant removal power to another branch of government. *Id.* at 673-74. This Court found that the independent counsel was an inferior officer because their powers were limited to investigation and prosecution, neither of which "impede the President's ability to perform his constitutional duty." *Id.* at 691.

The same rationales applied in *Humphrey's Executor* and *Morrison* apply here. Exactly like the FTC commissioner in *Humphrey's Executor* and the independent counsel in *Morrison*, the CFPB ALJs are not purely executive in nature. The scope of the CFPB's power consists of conducting investigations, issuing subpoenas and civil investigative demands, initiating administrative adjudications, bringing suits to federal court, and issuing binding and enforceable decisions. *Seila Law LLC*, 140 S. Ct. at 2193. These adjudicatory powers are, similar to *Humphrey's Executor*, quasi-judicial responsibilities and must be free from executive control. Additionally, similar to the independent counsel in *Morrison*, CFPB ALJs are inferior officers because their power is limited to investigation and prosecution and thus does not impede the President's ability to perform his constitutional duties.

While this Court found the multi-level removal scheme in *Free Enterprise Fund v. Public Company Accounting Oversight Board* unconstitutional, our case is distinguishable. There, Congress enacted the Sarbanes-Oxley Act which created the Public Company Accounting Oversight Board ("PCAOB") and tasked the Securities Exchange Commission with its oversight. *Free Enter. Fund v. Pub. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010). PCAOB members were insulated from Presidential control by two layers: PCAOB members could only be removed by the SEC for good cause, and similarly, SEC Commissioners could only be removed by the President for good cause. *Id.* at 486-87. This Court found this removal structure unconstitutional because the

PCAOB members were not accountable to the President, thereby interfering with the President's duty to ensure that the laws are faithfully executed. *Id.* at 484.

In *Duka v. SEC*, No. 15 Civ. 357, 2015 WL 5547463, at *15 (S.D.N.Y. Sept. 17, 2015), the Southern District of New York held that *Free Enterprise Fund* did not create a "categorical rule forbidding two levels of 'good-cause' tenure protection." The court concluded that what matters when deciding the constitutionality of a removal system is not the number of layers of protection per se, but whether the removal scheme is structured as to "infringe" on the President's duty to ensure that the laws are faithfully executed. *Id.* at *17.

Unlike the SEC Commissioners in *Free Enterprise Fund*, ALJs' responsibilities are solely adjudicatory in nature, and thus do not encroach on the President's responsibilities. This Court explicitly excluded ALJs from its *Free Enterprise Fund* holding because they "perform adjudicative rather than enforcement or policymaking functions" and "possess purely recommendatory powers." *Free Enter. Fund*, 561 U.S. at 507 n.10. The President's inability to remove CFPB ALJs is thus not so fundamental to the functioning of the executive branch as to require that they be terminable at will by the President. *Id.*

Thus, because the scope of an ALJs duty is solely adjudicatory in nature, the dual-cause removal restrictions do not infringe upon the President's authority to appoint executive officials and take care that the laws are faithfully executed.

B. Due Process Concerns Support the Constitutionality of the Dual-Cause Removal Scheme.

Due process concerns also support the constitutionality of dual-cause removal of ALJs. Too much presidential control over ALJs will generate due process concerns. This Court has recognized that direct presidential control over ALJs may not be required because of the need for impartial and independent agency adjudication. *Id.* at 506-07, 507 n.10.

Under the current system, ALJs are removable only for good cause "established and determined by the [MSPB], an independent, multimember federal agency." 5 U.S.C. § 7521(a). Good cause determinations must be made "on the record and after opportunity for a hearing before the Board." 5 C.F.R. § 930.211 (2022). Members of the MSPB themselves may only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). The best reading of "good cause" excludes the ability to remove an ALJ on the Department Head's recommendation for failure "to follow agency policies, procedures, or instructions." *Sutherland*, 505 F.4th at 19 (citing Recent Guidance, 132 Harv. L. Rev. 1120, 1123 (2019)). Department Head's ability to determine a "good cause" reason for firing an ALJ might create dangerous "executive control of the administrative state." *Id.* (citing Recent Guidance, *supra*, at 1120-21)).

The CFPB Director maintains significant control over the administrative adjudication process. *See* 12 C.F.R. § 1081.405 (2022). Any findings that the ALJ makes are classified as "preliminary findings." 12 C.F.R. § 1081.400 (2022). And, "[a]ny party may file exceptions to the preliminary findings and conclusions of the [ALJ]," 12 C.F.R. § 1081.402 (2022), which may then be appealed to the Director for a "final decision." *Id.* §§ 1081.402, 1081.405. The Director has full discretion to modify or set aside any ALJ findings or conclusions, including those that bear on agency policy. *Sutherland*, 505 F. 4th at 19. The President's power to remove the Director thus protects the President's policy preferences. *See Seila Law*, 140 S.Ct. at 2204 ("[T]he Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans); *Free Enter. Fund,* 561 U.S. at 507 n.10 (distinguishing ALJs from PCAOB members because "many administrative law judges of course perform adjudicative rather than enforcement or policy making functions or possess purely recommendatory powers).

The dissenting judges in *Free Enterprise Fund* noted that Congress implemented ALJ tenure protections for the purpose of "impartial adjudication." 561 U.S. at 522 (Breyer, J. dissenting). This concern is mitigated by the Director's possession of full policymaking control over the CFPB's adjudicative structure. *Sutherland,* 505 F.4th at 19. ALJs merely ensure that the hearings are conducted independent of untoward influence from the executive branch. *Id.* at 19.

Without the two layers of removal protection, the CFPB's adjudicative structure will be subject to pressure from the executive branch. If ALJs lose one of their two layers of removal protection, there are two possible outcomes: (1) ALJs will become removable at-will by the MSPB; or (2) ALJs will retain their for-cause protections from the MSPB, but the President could remove the MSPB members at-will. Spencer Davenport, *Resolving ALJ Removal Protections Problem Following* Lucia, U. MICH. J.L. REFORM 693, 708 (2020). In either event, ALJs will be at risk of being "discharged at the whim or caprice of the agency or for political reasons." *Id.* (quoting *Ramspeck v. Federal Trial Examiners Conf.,* 345 U.S. 128, 142 (1953)). This creates substantial due process concerns because the agency could now directly choose the ALJ, be parties in front of the ALJ, and then have the ability to remove the ALJ. *Id.* at 708. This jeopardizes the impartiality of the ALJs and the credibility and effectiveness of CFPB adjudication.

B. Congressional intent supports the ALJ dual-layer for-cause restrictions on the President's ability to remove ALJs.

Legislative intent also supports the constitutionality of the dual-layer removal process. Congress passed the APA to ensure due process is upheld in administrative proceedings, which includes protecting the independence of ALJs. Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 50 (2020); *see* 92 Cong. Rec. 2149 (1946).

More specifically, Congress believed ALJs should hold an independent status apart from the hiring and prosecuting agency. Thomas C. Rossidis, *Article II Complications Surrounding*

SEC-Employed Administrative Law Judges, 90 ST. JOHN'S L. REV. 773, 780 (2016) (citing 92 Cong. Rec. at 5655). Congress examined two proposals: (1) "the examiners should be entirely independent of agencies, even to the extent of being separately appointed"; or (2) "examiners [should] be selected from agency employees and function merely as clerks." *Id.* (quoting 92 Cong. Rec. at 5655). The APA mandated the separation of an agency's prosecutorial and adjudicatory functions and prohibited *ex parte* contacts during an adjudication. Levy & Glicksman, *Restoring ALJ Independence, supra,* at 50; *see* 5 U.S.C. § 554(d). The APA also subjected hearing examiners to civil service protections, including merit selection, good-cause requirements for adverse employment actions, and salary determination made independent of any agency performance evaluations. Congress intended for these protections to create distance between the MSPB and its ALJs to satisfy its independence concerns. Rossidis, *Article II Complications Surrounding SEC-Employed Administrative Law Judges, supra*, at 780.

The MSPB has been a core protection of independent administrative adjudication since the APA's adoption. Levy & Glicksman, *Restoring ALJ Independence,* at 59. The MSPB has oversight over ALJs in the employment context and is tasked with upholding the "Merit System Principles" applicable to all federal employees. *Sutherland*, 505 F.4th*,* at 205; 5 U.S.C. § 2301. The "origins of the MSPB may be traced back more than a century, as part of efforts to curtail the practice of political patronage in the federal government," Jon O. Shimabukuro & Jennifer A. Staman, Cong. Rsch. Serv. *R45630, Merit Systems Protection Board (MSPB): A Legal Overview* 2 (2019). The MSPB operates to limit political patronage and influence in the federal employment system, a goal that is achieved by enforcing the Merit Systems Principles laid out in 5 U.S.C. § 2301(b). *Sutherland*, 505 F.4th at 20. Because the MSPB relates solely to the functions of the ALJ's role,

"good cause" determinations do not involve policy decisions and thus presidential control is not necessary. *Id.* at 21.

CONCLUSION

The United States cannot afford another financial crisis of the same magnitude as the financial crisis of 2008. Agency adjudication by the CFPB is essential to ensure the thrust of the CFPA is effectuated. Agency adjudication and assessment of civil penalties under the CFPA do not implicate the Seventh Amendment right to a jury trial because the CFPA falls squarely within the public rights exception. Even in the absence of this exception, the claims arising from the CFPA still are not entitled to this right because the CFPA is not analogous to a common law claim or remedy as it existed when the Seventh Amendment was ratified. The dual-layer removal scheme also does not violate the Constitution because ALJs serve an adjudicatory role that does not impede the President's ability to perform his constitutional duties. The dual-layer removal scheme's constitutionality is supported by due process concerns and legislative history.

Applicant Details

First Name	**Korinne**
Last Name	**Dunn**
Citizenship Status	**U. S. Citizen**
Email Address	**korinned@pennlaw.upenn.edu**
Address	**Address** Street **1338 Chestnut St Apt 616** City **Philadelphia** State/Territory **Pennsylvania** Zip **19107** Country **United States**
Contact Phone Number	**8123403768**

Applicant Education

BA/BS From	**Indiana University-Bloomington**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Regulatory Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Levick, Marsha
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Davis, Michael
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Korinne A. Dunn
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June 8, 2023

The Honorable Jamar K. Walker
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to request your consideration of my application for a clerkship beginning in fall 2024. I am a third-year law student at the University of Pennsylvania Carey Law School.

As a former educator in an under-resourced middle school and previous legal intern with Juvenile Law Center, Education Law Center, and the Civil Rights Division of the U.S. Department of Justice, I am passionate about continuing to serve the public as a law clerk. I have developed writing, communication, and legal research skills through experience as a writing teacher and professional development facilitator, through legal internships that have required me to answer challenging research questions and present findings both in writing and orally, and through work as an associate editor with *The Regulatory Review*. I am continuing to develop direct representation skills this summer as an intern with Community Legal Services of Philadelphia.

I enclose my resume, transcript, and writing sample. Letters of recommendation from Professor Marsha Levick (mlevick@jlc.org, 267-257-0394), Professor Michael Davis (michaeladavis888@gmail.com, 610-505-6387), and Professor Tess Wilkinson-Ryan (twilkins@law.upenn.edu, 215-746-3457) are also included. Please let me know if any other information would be useful for your consideration. Thank you.

Respectfully,

Korinne A. Dunn

Korinne Dunn

1338 Chestnut St, Apt 616 | Philadelphia, PA 19107 | (812) 340-3768 | korinned@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA
J.D. Candidate, May 2024
Dean's Scholar; William Henry Wilson Scholar
Associate Editor, *The Regulatory Review*
Member, Criminal Record Expungement Project

University of Louisville, Louisville, KY
Master of Arts in Teaching, May 2018

Indiana University, Bloomington, IN
B.A., Anthropology, *summa cum laude*, May 2016
Honors: Phi Beta Kappa, Executive Dean's List, Founder's Scholar, National Society for Linguistic Anthropology Undergraduate Paper Prize

EXPERIENCE

Community Legal Services, Philadelphia, PA — May 2023–August 2024
Summer Intern

Special Litigation Section, Civil Rights Division, DOJ, Washington, DC — January 2023–May 2023
Spring Extern
- Served on Police Practice Group case team at investigation stage. Contributed to Corrections and Juvenile Practice Groups. Researched issues related to homelessness, disability, and discrimination.

Education Law Center, Philadelphia, PA — September 2022–December 2022
Fall Extern
- Researched enforceability of settlement terms for class action. Researched the application of disability education law to students languishing in residential settings. Conducted client intake.

Juvenile Law Center, Philadelphia, PA — June 2022–August 2022
Summer Intern
- Prepared for and observed depositions in class action against high-profile youth detention center. Researched immunity in class action against state parole board. Researched trends on youth transfer.

Jefferson County Public Schools, Louisville, KY — July 2016–May 2021
Teacher, Middle Grades English Language Arts
- Created and implemented curriculum in literacy and writing for 7th and 8th graders
- *Committees/boards*: Professional Learning Community Lead, 2020–2021; Jefferson County Teachers Association (JCTA) Representative, 2018–2021; National Seeking Educational Equity and Diversity Project, 2018–2020; Racial Equity Team, 2017–2021; Student LGBTQ+ Club Sponsor, 2019–2021.

Adolescent Literacy Project, Louisville, KY — May 2020–April 2021
Program Co-Facilitator
- Developed and facilitated English Language Arts professional development.

Bhutanese American Hindu Society, Louisville, KY — July 2016–May 2020
Volunteer Grant Drafter, English Language Support

Kentucky Refugee Ministries, Louisville, KY — August 2017–December 2019
Volunteer, English Language Tutor

New Leaf-New Life, Bloomington, IN — July 2015–December 2017
Volunteer, Program Co-Facilitator
- Facilitated workshops in argument for incarcerated individuals. Assisted formerly incarcerated clients with resume building, job searches, and community resources.

Korinne Dunn
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Spring 2023
Note: I will provide an updated transcript on or after June 12.

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Labor Law	Sean Burke	A	3
National Security Law	Claire Finkelstein	A	3
Law Reform Litigation	Mark Aronchick	A	1
Ad-Hoc Externship	Marsha Levick	In Progress	7

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Professional Responsibility	Brent Landau	A	2
Federal Income Tax	Chris Sanchirico	A	3
Discrimination in Education	Michael Davis	A-	3
Juvenile Justice	Jessica Feierman, Marsha Levick	A	3
Ad-Hoc Externship	Marsha Levick	CR	3

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Criminal Law	Shaun Ossei-Owusu	A	4
Constitutional Law	Kermit Roosevelt	B+	4
Consumer Law	Tess Wilkinson-Ryan	B+	3
Reproductive Rights and Justice	Dorothy Roberts	B+	3
Legal Practice Skills	Jessica Simon	CR	2
Legal Practice Skills Cohort	Erich Makarov	CR	0

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Civil Procedure	Yanbai Andrea Wang	B+	4
Contracts	David Hoffman	B	4
Torts	Karen Tani	B	3
Legal Practice Skills	Jessica Simon	CR	4
Legal Practice Skills Cohort	Erich Makarov	CR	0

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Korinne Dunn

Dear Judge Walker:

I write enthusiastically to support Korinne Dunn's application for a clerkship with Your Honor.

I first met Korinne Dunn in Fall 2022 when she was a student in my Juvenile Justice Seminar at Penn Carey Law School. The class met weekly for two hours, Students were required to prepare both oral and written presentations on an issue of their choosing, as well as attend and participate in weekly discussions. Korinne was an avid participant, offering interesting insights and asking probing questions. Throughout the semester, Korinne consistently demonstrated her intellectual acuity, critical thinking skills, and strong research and writing ability.

More recently, I served as Korinne's faculty supervisor for her Spring externship with the Special Litigation Section of the U.S. Department of Justice, Civil Rights Division. In this capacity, I met bi-weekly with Korinne to discuss her work and reflections in this position, and also reviewed her bi-weekly written journal entries describing the various assignments she was working on as well as any questions or challenges she was facing.

I thoroughly enjoyed serving as Korinne's supervisor for her externship. I looked forward to reading her journal entries and always appreciated our follow-up conversations where we discussed in depth not only the work she was doing but her reactions to the work and her new colleagues. I always found Korinne to be an astute observer and chronicler of her experience at DOJ. She asked important questions about the direction, strategy or even value of some of her research assignments, and was extremely thoughtful in her assessment of the litigation – or potential litigation – she was exposed to.

I particularly appreciated her intellectual curiosity about the legal approach DOJ might be taking in a particular matter, or her candid concern that some of her assignments often took her to a dead end. What I observed over the course of our semester-long conversations was her growth as a law student-- and perhaps more importantly her growth as a future lawyer. Korinne entered her externship excited for the opportunity but uncertain of what to expect, and still unsettled about her future career direction. When the externship came to a close, Korinne had a much clearer vision for her own future, motivated by the commitment, passion and dedication of her DOJ colleagues. Wisely, she came to understand that the path for civil rights attorneys is rarely even or straight; known and unknown challenges invariably create detours and obstacles, as well as new opportunities.

I see the direct evidence of her growth in her decision to pursue this judicial clerkship. We discussed repeatedly in our bi-weekly calls how she could connect her experience at DOJ to her next and most immediate post-graduation career goals. She is anxious to continue to develop her research and writing skills – already exceptional – and continue to explore new subject matter areas. Korinne is excited about this opportunity to pursue a clerkship as she continues to formulate her professional path.

Finally, Korinne is a delightful person to work and engage with. She is confident, driven, and always intellectually curious about the work she is undertaking. As one of the first in her family to achieve this level of education, she also demonstrates humility in the way she approaches her work and is always mindful of the extraordinary opportunities she has had, and will have, to do work that she cares deeply about. I am extremely supportive of Korinne and recommend her to you without qualification. If I may be of further assistance, please do not hesitate to reach out to me via email or phone.

Sincerely,

Marsha Levick
Adjunct Faculty
University of Pennsylvania Carey Law School

Chief Legal Officer
Juvenile Law Center
(215) 625-0551
mlevick@jlc.org

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Korinne Dunn

Dear Judge Walker:

It is my great pleasure to offer my recommendation to support Korinne Dunn and her interest in applying to serve as a judicial clerk. Ms. Dunn has the character, intellect, legal knowledge and skills, work ethic and dedication, and even temperament to serve with distinction and honor. She is a former student in my seminar course, Discrimination in Education, at the University of Pennsylvania Carey Law School. Prior to her enrollment in the course for the fall 2022 semester, Ms. Dunn introduced herself and asked if I would support her as faculty sponsor for her externship with the Education Law Center (ELC), a public interest non-profit firm focusing on educational rights and related litigation and advocacy. The externship program was highly structured and required that we meet hourly every other week in the semester to review and discuss her experiences and the detailed reflective journal entries she had written for each session. In addition to having Ms. Dunn in my class, working with her on the ELC externship gave me a good opportunity to assess her worthiness for advancing her legal career and serving as a judicial clerk.

Before attending law school, Ms. Dunn had demonstrated her intellectual ability and dedication to excellence, first by earning her bachelor's degree in Anthropology from Indiana University in 2016, with summa cum laude and Phi Beta Kappa honors. After graduating, she taught in public school in Louisville, Kentucky from 2016 to 2021, with a strong focus on English language arts and literacy. She created and implemented a curriculum for teaching literacy and writing to middle school students. In 2018 Ms. Dunn earned a Master of Arts in Teaching degree from the University of Louisville while teaching full time. With her qualifications and qualities Ms. Dunn was admitted to and entered the University of Pennsylvania Carey Law School in fall 2021. She has continued to expand her knowledge and intellectual capacity and abilities, most notably as to the study of law and legal practice. Her achievement of Dean's Scholar status underscores her work ethic and desire to succeed.

Ms. Dunn has exemplified a strong service orientation in volunteering for several projects and initiatives. During her public school tenure, in addition to her teaching responsibilities, she provided support for community literacy and English language improvement programs. For example, Ms. Dunn developed and co-facilitated the Adolescent Literacy Project in Louisville. She also volunteered to assist with English language support for the Bhutanese American Hindu Society, and she was a volunteer tutor for Kentucky Refugee Ministries. She has continued in her service orientation while at law school, working as a member of the Criminal Record Expungement Project.

In my course, Ms. Dunn also demonstrated she has the required intellectual capacity and practical and diplomatic skills necessary to become and exceed expectations as a judicial clerk. I teach a seminar course with enrollment limited to fourteen students to encourage and facilitate participation in class discussions. Ms. Dunn came to class prepared and contributed regularly with analysis, comments, and good questions. Her educational background and public school experiences were helpful to the class because she offered important knowledge, perspectives, and understanding of real-world teaching and learning. Ms. Dunn also excelled in the presentation of an in-class oral argument required for course completion. Students are randomly paired to give opposing counsel arguments, with questions directed from the class "court." As part of the requirement, students must prepare for oral argument based on assigned cases for the week and must write and "serve" written memoranda prior to the argument. Ms. Dunn showed her ability in both components of advocacy skills, writing her legal arguments and presenting them orally before an interrogating body, at the highest level of class performance.

Ms. Dunn's legal writing skills were displayed in her final paper for the course in which she analyzed the complicated and divisive issues surrounding racial segregation, remedy, and resegregation in Jefferson County public schools in Louisville Kentucky. She explored the impact of the Supreme Court's decision in Parents Involved and its lack of deference to the school district's educational expertise and judgment, contributing to resegregation. She deftly reviewed the segregation history of the district and the evolution of litigation which resulted in the district's voluntary desegregation plan as a foundation for a comprehensive discussion of the use of race in student assignments. Applying data, policy arguments, and a detailed Equal Protection analysis, she articulated how the use of race in student assignments by Jefferson County did not violate the Equal Protection Clause. Ms. Dunn's writing was clear, succinct, and persuasive. She presented her thesis at the beginning, set up the issues well, and took them to conclusion in logical order.

Ms. Dunn achieved great success in her externship in several respects. I believe she fulfilled the objectives of the program by deepening her substantive knowledge, sharpening essential lawyering skills, and appreciating professional values. Ms. Dunn's placement supervisor evaluated her performance as excellent. Her lawyering and legal writing skills were highly rated, and she was dependable and reliable. She was punctual, efficient with good organizational skills, and met expected deadlines. In our meetings to review her reflexive journal entries, we discussed many matters and issues, including substantive and procedural issues, legal ethics, lawyering and legal practice, case strategy, and office politics. Ms. Dunn demonstrated great instincts by raising questions about interactions with others in the office and about attorney decisions and reasons for certain actions. Ms. Dunn is forthright, diligent and diplomatic, and she is eager to learn and improve. I enjoyed mentoring her because she is a

pleasure to work with and she works hard.

I wholeheartedly recommend Ms. Dunn to serve as judicial clerk. Thank you.

Sincerely,

Michael A. Davis, Esq.
michaeladavis888@gmail.com
610-505-6387

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Korinne Dunn

Dear Judge Walker:

I am writing to recommend Korinne Dunn for a clerkship. Korinne is a wonderful student and a remarkable citizen of every community she belongs to, and I am thrilled to recommend her.

I taught Korinne in a first-year elective course, Consumer Law, in the spring of 2022. She was a thoughtful, prepared participant, even in a class of 90 students.

In our Consumer Law class, I had students complete an unusual activity, which was to read a work of sociology on for-profit post-secondary schools and to discuss in class and to write me a short memo on the legal implications of what they were reading about. Korinne made an astute connection between the narrow doctrine of misrepresentation of opinion in the common law and the fraud claims plaguing some for-profit schools. She drew on the opinion from Vokes vs. Arthur Murray to make this comparison:

In Arthur Murray, the plaintiff was seen by the court as a victim of a scheme designed to pressure her into spending more money to achieve more stature-- the court's decision turned on the fact that the person pressuring her expenditures, the teacher, possessed and weaponized his superior knowledge of her lack of skill. In for-profit school recruiting, as [the author of Lower Ed] portrays it, the “enrollment officers” were evidently aware of the relatively low worth of the degrees they were selling to students and of the relatively high likelihood that the prospective students would not complete the degree requirements to make their investments worthwhile.

She concluded with the core of the dilemma, noting that any intervention into the contracts between schools and students risks doing more harm than good with “regulations…hindering their ability to participate in the education and labor market.” Korinne is a great writer, and that skill shone through on her exam as well.

Korinne is a first-generation professional student who came to Penn Law after five years teaching middle school English. She describes her experience teaching in public schools in Kentucky as an abrupt realization of her own limitations as a new teacher —especially as an outsider, racially and geographically, to her students’ community—and a systematic, dogged insistence on improving that yielded real progress over time. Her transcript from Penn suggests that this ability to dig in and learn is part of a pattern. Her first semester was clearly rocky, her second semester an improvement, and by the time she completed the notoriously challenging Tax course her 2L fall, she was a straight-A student.

Finally, Korinne is a committed member of her community, wherever it is. When she was in college, she taught employment workshops for incarcerated and formerly-incarcerated people. When she was teaching middle school in Louisville, she sponsored the LGBTQ+ Club and the Racial Equity committee. At Penn Law, she works with the Criminal Record Expungement Project and edits the Regulatory Review. She is incredibly well-liked by her peers, because she is a real contributor who is also a lovely person to be around.

If I can offer any further reflections on this wonderful student, please do not hesitate to reach out by phone (cell: 215-668-4272) or email.

Sincerely,

Tess Wilkinson-Ryan
Professor of Law
Tel.: (215) 746-3457
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WRITING SAMPLE

The attached writing sample is a memorandum that I drafted as an assignment during a semester externship with the United States Department of Justice, Civil Rights Division, Special Litigation Section. I was asked to research whether a city's police department may violate the Eighth Amendment Cruel and Unusual Punishments Clause when its officers wake individuals experiencing homelessness sleeping in public areas and ask them to move under threat of arrest. I performed all research and this work is entirely my own.

All identifying facts and references to specific departments and cities have been redacted for confidentiality. I am submitting the attached writing sample with the permission of the Special Litigation Section.

Disclaimer: The views and analysis in this memorandum are my own and do not necessarily reflect the views of any other person or organization.

MEMORANDUM

DATE	April 28, 2023
TO	[Redacted]
FROM	Korinne Dunn
SUBJ	Memorandum on application of the Eighth Amendment to police threats of arrest toward people experiencing homelessness.

QUESTION PRESENTED

Does a police department violate the Eighth Amendment when it invokes a city's overturned anti-camping ordinance to order individuals experiencing homelessness to wake up and move under threat of arrest?

BRIEF ANSWER

It is unlikely a police department violates the Eighth Amendment Cruel and Unusual Punishments Clause when its officers wake individuals experiencing homelessness and order them to move under threat of arrest alone. The Ninth Circuit has held that for the Cruel and Unusual Punishments clause to apply, individuals must be subjected to a criminal penalty, such as a citation, fine, arrest, or prosecution. No such penalty is imposed when officers merely threaten individuals with arrest.

However, if the order to move under threat of arrest initiates a criminal process that leads to criminal penalties in the future, the practice may implicate the Eighth Amendment Cruel and Unusual Punishments Clause. The strength of such an argument may depend on the extent to which the police practice can be said to contribute to subsequent criminalization.

DISCUSSION

I. IT IS UNLIKELY A POLICE DEPARTMENT VIOLATES THE EIGHTH AMENDMENT CRUAL AND UNUSUAL PUNISHMENTS CLAUSE WHERE NO CRIMINAL PENALTY IS IMPOSED.

A police department is unlikely to violate the Eighth Amendment Cruel and Unusual Punishments Clause by waking individuals experiencing homelessness and ordering them to move under threat of arrest, where no such arrest or other criminal penalty is imposed.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Cruel and Unusual Punishments Clause circumscribes the criminal process by 1) limiting the types of punishment the government may impose, 2) banning punishment "grossly disproportionate" to the severity of the crime, and 3) placing substantive limits on what the government may criminalize. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). Here, only the third limitation is relevant. The Ninth Circuit has held that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." *Martin v. Boise*, 920 F.3d 584, 617 (9th Cir. 2019), *cert. denied sub nom Boise v. Martin*, 140 S. Ct. 674 (2019).

Courts in the Ninth Circuit have held there must be an initiation of the criminal process for the *Martin* rule to apply. *See e.g., Housing is a Human Right Orange County. v. County. of Orange*, No. SACV19388PAJDEX, 2019 WL 8012374 at *5 (C.D. Cal. Oct. 28, 2019) (*Martin* "…require[es] the initiation of the criminal process to state a claim for damages for an Eighth Amendment violation"). Some courts in the Ninth Circuit have held the criminal process is initiated only when the challenged action includes direct imposition of criminal penalties, such as criminal citation, arrest, or prosecution. *See e.g., Shipp v. Schaaf*, 379 F. Supp. 3d 1033, 1037

(N.D. Cal. 2019) (declining to extend *Martin* where closure of a homeless camp did not result in criminal sanctions); *see also Butcher v. City of Marysville*, No. 218CV02765JAMCKD, 2019 WL 918203, at *1-2, 7 (E.D. Cal. Feb. 25, 2019) (refusing to apply the Eighth Amendment "beyond the criminal process" where eviction and destruction of property by the city did not also include imposition of criminal sanctions). However, other courts have held the Eighth Amendment is implicated when criminal penalties result indirectly from the challenged state action, including through imposition of civil penalties that lead to criminal penalties down the line. *See e.g., Johnson v. City of Grants Pass,* 50 F.4th 787 (9th Cir. 2022) (holding the city could not evade Eighth Amendment analysis by taking a "circuitous" path to criminalization by imposing civil citations which led to subsequent criminal penalties); *see also Austin v. United States*, 509 U.S. 602, 609-10 (1993) (holding the Eighth Amendment applies to civil and criminal punishment).

The Ninth Circuit has explicitly rejected the theory that the mere threat of a criminal penalty can constitute an Eighth Amendment violation. *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) ("[I]t trivializes the eighth amendment to believe a threat constitutes a constitutional wrong…"); *see also Young v. City of Los Angeles*, No. CV2000709JFWRAO, 2020 WL 616363 (C.D. Cal. Feb. 10, 2020) (finding no Eighth Amendment claim where plaintiff was not criminally prosecuted but where police merely issued false tickets and reports); *see also Walton v. Terry*, 38 F. App'x 363 (9th Cir. 2002) ("…[V]erbal threats alone do not constitute cruel and unusual punishment"); *see also Sullivan v. City of Berkeley*, No. C 17-06051 WHA, 2018 WL 1471889 (N.D. Cal. Mar. 26, 2018) (declining to extend *Martin* to "the mere threat of arrest as opposed to an arrest or citation").

However, one court in the Ninth Circuit recently included threats of punishment in its Eighth Amendment analysis, where those threats were tied to the imposition of criminal penalties.

See Coalition on Homelessness v. City & Cnty. of San Francisco, No. 22-CV-05502-DMR, 2022 WL 17905114 at 27 (N.D. Cal. Dec. 23, 2022) (granting a preliminary injunction prohibiting officers from enforcing or threatening to enforce certain laws prohibiting sitting, lying, and sleeping on public property).

Under Ninth Circuit precedent, a police department does not likely initiate the criminal process when its officers merely threaten individuals with arrest, rather than imposing criminal penalties such as citations, arrests, or prosecution. However, if further investigation into the police department's practice reveals threats of arrest lead to criminal penalties down the line, the Eighth Amendment Cruel and Unusual Punishments Clause may apply.

A. A Police Department Has Not Likely Initiated the Criminal Process Where Officers Have Not Imposed Criminal Penalties.

A police department has not likely initiated the criminal process when its officers threaten individuals experiencing homelessness with arrest but do not either actually make an arrest or impose other criminal penalties, whether directly or indirectly. Courts in the Ninth Circuit have held criminal penalties must be imposed in order to establish an Eighth Amendment claim under *Martin*. *See e.g., Catchings v. City of Los Angeles*, 2020 WL 5875100 (C.D. Cal. 2020) (finding no Eighth Amendment claim where an individual experiencing homelessness was ordered to leave a public area in which she had set up a tent, but where she did not allege to face any criminal penalties); *see also Le Van Hung v. Schaaf*, No. 19-CV-01436-CRB, 2019 WL 1779584 (N.D. Cal. Apr. 23, 2019) (finding no Eighth Amendment violation where the city cleared and cleaned a park, but where police did not arrest plaintiffs); *see also Mahoney v. City of Sacramento*, No. 220CV00258KJMCKD, 2020 WL 616302 at *3 (E.D. Cal. Feb. 10, 2020) (finding plaintiffs did

not likely have an Eighth Amendment claim because removal of a portable toilet from an encampment did not constitute a criminal penalty); *see also Young v. County. of Los Angeles*, No. CV 20-00709-JFW(RAO), 2020 WL 616363, at *5 (C.D. Cal. Feb. 10, 2020) (holding the "Eighth Amendment only bars the City from criminally prosecuting Plaintiff for sleeping on public streets when he has no other place to go to"); *but cf. Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1082 (W.D. Wash. 2019) (requiring additional argument and briefing to determine whether the rationale in *Martin* concerning criminal sanctions extends to the civil penalties imposed by an anti-camping ordinance).

A mere threat of a criminal penalty has been found insufficient to make an Eighth Amendment claim. *See Housing is a Human Right Orange County*, No. SACV19388PAJDEX, 2019 WL 8012374; *see also Gaut*, 810 F.2d at 925. In *Housing is a Human Right Orange County*, the Central District of California found that there was no valid Eighth Amendment claim where officers merely threatened individuals with arrest but did not actually arrest them or impose a criminal penalty. *Housing is a Human Right Orange County*, No. SACV19388PAJDEX, 2019 WL 8012374, at *5. Plaintiffs, who were individuals experiencing homelessness, alleged officers violated the Eighth Amendment by rousing individuals experiencing homelessness and threatening them with arrest. *Id.* at *4-5. Plaintiffs further alleged defendants had "'a custom, policy, and/or practice of encouraging its officers, employees and agents to threaten enforcement of City ordinances and citations and arrest of homeless persons for the unavoidable behavior of sleeping or having property in public based on their unhoused status.'" *Id.* at *5. The court determined threats of arrest were insufficient to state an Eighth Amendment claim. *Id.* It reasoned that *Martin* "…require[es] the initiation of the criminal process to state a claim for damages for an Eighth Amendment violation," and it determined the criminal process was not initiated by the officers'

mere threats of citation and arrest. *Id.* at 5. The court also cited to the holding in *Gaut* that it "trivializes the Eighth Amendment to believe a threat constitutes a constitutional wrong." *Id.* at 5 (citing *Gaut v. Sunn,* 810 F.2d 923, 925 (9th Cir. 1987).

Similarly, in *Catchings v. City of Los Angeles*, the court held there was no Eighth Amendment claim where the plaintiff did not allege she was subjected to criminal penalties. *Catchings v. City of Los Angeles*, 2020 WL 5875100 (C.D. Cal. 2020). The plaintiff, a person experiencing homelessness, brought an Eighth Amendment claim against the city after she was ordered by police on two occasions to leave a public area where she had set up a tent. *Id.* at 1. On one occasion, police destroyed her property. *Id.* On another occasion, police cited her for camping outside permitted hours, but she was later acquitted due to lack of notice. *Id.* The court determined the Eighth Amendment rule in *Martin* did not apply because the plaintiff in this case did not allege to have faced any criminal penalties in connection with the incidents. *Id.* at *7.

Under Ninth Circuit precedent, it seems unlikely a police department's officers would be held to have directly initiated the criminal process by threatening individuals experiencing homelessness with arrest without actually imposing criminal penalties. Like in *Housing is a Human Right*, if officers appear to have a "custom, policy, and/or practice" of invoking but not acting on a city statute by threatening individuals with arrest, police do not likely initiate the criminal process. Further, like in *Catchings*, police do not likely initiate the criminal process when they ask an individual experiencing homelessness to move from their public sleeping location but where a criminal penalty is not alleged to have been imposed. Under Ninth Circuit precedent, it seems unlikely threats alone, without imposition of criminal penalties, arise to a violation of the Eighth Amendment.

B. A Police Department May Indirectly Initiate the Criminal Process If Threats Lead to Criminal Penalties Down the Line.

While the above cases demonstrate the Ninth Circuit does not apply the Eighth Amendment Cruel and Unusual Punishments Clause before the criminal process is initiated, there are courts within the Ninth Circuit and in other circuits that have applied the Eighth Amendment to cases where the process of criminalization is held to be indirect. *See e.g., Johnson v. City of Grants Pass*, 50 F.4th 787, 806 (9th Cir. 2022) (a "circuitous" path to criminalization cannot evade the Eighth Amendment analysis); *Fitzpatrick v. Little*, No. 1:22-CV-00162-DCN, 2023 WL 129815 (D. Idaho Jan. 9, 2023) (while the Eighth Amendment does not apply outside the criminal context, "eventual" criminal sanctions can implicate *Martin* and *Jones*); *Phillips v. City of Cincinnati*, No. 1:18-CV-541, 2020 WL 4698800 (S.D. Ohio Aug. 13, 2020) (plaintiffs had standing to bring an Eighth Amendment claim on the basis of imminent future harm where the city had a history of issuing trespass orders warning individuals they would be subject to arrest if they remained at their camping site); *see also Jones v. City of Los Angeles*, 444 F.3d 1118, 1129 (9th Cir. 2006), *vacated as a result of settlement*, 505 F.3d 1006 (9th Cir. 2007) (the criminal process "may begin well before conviction… at arrest… at citation… or even earlier"); *but cf. Shipp v. Schaaf*, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019) (acknowledging the Eighth Amendment can be implicated through "indirectly" imposed criminal consequences, but declining to extend *Martin* where there was no evidence the city enforced temporary camp closures via citations or arrests).

The Ninth Circuit has held that the Cruel and Unusual Punishments Clause applies to civil citations that, later, become criminal offenses. *Johnson v. City of Grants Pass,* 50 F.4th 787, 807 (9th Cir. 2022). Plaintiffs, individuals experiencing homelessness, brought an Eighth Amendment claim against the city for issuing civil citations that later resulted in criminal penalties. *Id.* Under

a scheme of city ordinances, individuals experiencing homelessness could be issued civil citations for camping in public. *Id.* If violated twice, the citations could lead to an exclusion order. *Id.* If the exclusion order was then violated, the individual could be cited for criminal trespass. *Id.* at 806-807. The court found this "circuitous approach" to criminalization could not "so easily avoid[]" the Eighth Amendment analysis under *Martin*. *Id.* The court pointed to a Fourth Circuit decision, which held unconstitutional a two-pronged statutory scheme criminalizing drunkenness. *Id.* at 807 (*citing Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019) (en banc). The statutory scheme began with preliminary civil sanctions and led to eventual criminal penalties. *Id.* at 807. The Fourth Circuit held that the fact that a city's statutory scheme operated in two steps did not change the Eighth Amendment analysis. *Id.* The Ninth Circuit applied this reasoning to hold, "imposing a few extra steps before criminalizing the very acts *Martin* explicitly says cannot be criminalized does not cure the anti-camping ordinances' Eighth Amendment infirmity." *Id.* at 808.

Mere threats of arrest under a statute may implicate the Eighth Amendment when there is evidence of actual enforcement. *See Coalition on Homelessness v. City & Cnty. of San Francisco*, No. 22-CV-05502-DMR, 2022 WL 17905114 (N.D. Cal. Dec. 23, 2022). In *Coalition on Homelessness*, the Northern District of California preliminarily enjoined defendants from "enforcing or threatening to enforce" certain laws prohibiting individuals experiencing homelessness from sitting, lying, or sleeping on public property. *Coalition on Homelessness*, No. 22-CV-05502-DMR, 2022 WL 17905114. The court found the Eighth Amendment was implicated where officers issued citations and made arrests, but also where officers separately ordered individuals experiencing homelessness to "move along" under threat of citation and arrest without first providing viable access to shelter. *Id*. In its order enjoining the defendants, the court

did not explain its rationale for including threats of arrest in its Eighth Amendment analysis. *See id.* It seems possible that, given the court's references throughout its order to instances in which the defendants imposed criminal penalties, officers' threats implicated the Eighth Amendment because of their apparent likeliness to be acted on.

Whether a police department's practice of threatening individuals with arrest leads to criminal sanctions down the line is a fact specific analysis. However, it is plausible that, like in *Grants Pass* and *Coalition on Homelessness*, officers may issue orders to individuals experiencing homelessness under threat of arrest that later result in criminal penalties. For example, police departments may have a practice of following threats of arrest with the issuance of trespass orders, which if violated result in criminal citations. Further, if officers log or run individuals' names as part of the process of asking individuals to move sleeping locations, officers may arguably use the practice of waking individuals as a means to initiate the criminal process. Further investigation would be needed to determine if the practice results in indirect criminalization.

CONCLUSION

Under Ninth Circuit precedent, it seems unlikely that a police department's practice of officers waking individuals and ordering them to move under threat of arrest, without the imposition of criminal penalties, amounts to a violation of the Eighth Amendment. However, if the facts are such that the threats lead to criminal penalties down the lines, the practice may be argued to be part of an indirect approach to criminalization of homelessness, implicating the Eighth Amendment Cruel and Unusual Punishments Clause.

Applicant Details

First Name	**Abraham**
Middle Initial	**S.**
Last Name	**Eichner**
Citizenship Status	**U. S. Citizen**
Email Address	**eichnera@umich.edu**
Address	**Address** Street **222 Vance Street** City **Chapel Hill** State/Territory **North Carolina** Zip **27516** Country **United States**
Contact Phone Number	**9194481768**

Applicant Education

BA/BS From	**Carleton College**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 3, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Campbell Moot Court** **1L Oral Advocacy Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Mendelson, Nina
nmendel@umich.edu
734-936-5071

Koernig, Kristin
Kristin.koernig@hq.doe.gov
(202) 586-3593

Buchsbaum, Andrew
buchs@umich.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 02, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at the University of Michigan Law School and am writing to apply for a clerkship in your chambers for the 2024–2025 term.

At Michigan Law, I have worked hard to develop my legal skills and have earned a 4.02 grade point average. I further developed my legal writing for the Campbell Moot Court competition, in which I reached the quarterfinals, and by writing a paper on cost-benefit analyses under the Clean Air Act that I hope to publish as a note. Prior to law school, I managed two successful city council races at once in Raleigh, which helped me learn to solve problems under time pressure. I then ran the legislative office for Minority Whip Jay Chaudhuri in the North Carolina Senate, where I honed my research and writing skills by drafting legislation such as the End Racial Profiling in Traffic Stops Act. I believe that my experiences would allow me to contribute to your chambers.

I seek an appellate court clerkship because I enjoy the process of legal analysis and writing, particularly on novel legal issues. I also believe a clerkship in your chambers would help prepare me to pursue environmental prosecutorial work due to your background in white-collar prosecution.

I have attached my resume, law school transcript, undergraduate transcript, and a writing sample. My letters of recommendation will be sent by:

- Professor Nina Mendelson: nmendel@umich.edu, (734) 936-5071
- Professor Andrew Buchsbaum: buchs@umich.edu, (734) 763-0404
- Ms. Kristin Koernig, Esq.: kristin.koernig@hq.doe.gov, (202) 586-3593

Thank you for your time and consideration.

Respectfully,
Abe Eichner

ABE EICHNER

222 Vance Street, Chapel Hill, NC 27516
919-448-1768 • eichnera@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor GPA: 4.02 (historically top 1%) — Expected May 2024
Honors: Dean's Scholar
Certificate of Merit (top grade) in: Legislation and Regulation; Criminal Law; Environmental Crimes
Activities: Quarterfinalist in Campbell Moot Court Competition; Semifinalist of 1L Oral Advocacy Competition; Treasurer of Environmental Law Society; Peer Tutor
Note in Progress: *The EPA Regulates Greenhouse Gases More Than You Think: Climate Co-Benefits Under the Clean Air Act*

CARLETON COLLEGE — Northfield, MN
Bachelor of Arts in Political Science, *Magna Cum Laude* — June 2018
Honors: Phi Beta Kappa, Dean's List, National Merit Scholar
Activities: First Team DIII All-American, Captain, GoP Ultimate Frisbee; Organizer, Students for a Livable Wage

EXPERIENCE

SOUTHERN ENVIRONMENTAL LAW CENTER — Chapel Hill, NC
Legal Intern — May 2023 – Aug 2023

US DEPARTMENT OF ENERGY, OFFICE OF THE GENERAL COUNSEL — Washington, DC
Legal Intern — May 2022 – July 2022

- Wrote series of memos assessing the risk a recent Fifth Circuit decision poses to Energy Policy and Conservation Act (EPCA) enforcement actions before ALJs, recommending that the DOE defend against a Seventh Amendment challenge by arguing EPCA enforcement action do not sound in common law
- Drafted motions for summary judgment and discovery requests for constructive discharge and FOIA cases
- Assisted draft of motion for summary judgment for challenge to EPCA energy conservation rulemaking on short-cycle dishwashers
- Wrote memo concluding that DOE could use Other Transaction Authority to make grants under the Bipartisan Infrastructure Law

NC SENATE MINORITY WHIP JAY CHAUDHURI — Raleigh, NC
Legislative Assistant — Dec 2019 – July 2021

- Researched and drafted the End Racial Profiling in Traffic Stops Act
- Worked with constituents to solve issues with state government by coordinating between state agencies as Senator Chaudhuri's only staffer, including resolving more than 300 claims for unemployment benefits

DAVID KNIGHT FOR RALEIGH CITY COUNCIL — Raleigh, NC
Campaign Manager — Mar 2019 – Oct 2019

- Managed campaign to defeat incumbent with a first-time environmentalist candidate
- Researched and prepared candidate for debates on city issues including public transit and environment

PATRICK BUFFKIN FOR RALEIGH CITY COUNCIL — Raleigh, NC
Campaign Manager — May 2019 – Oct 2019

- Won race for open seat with first-time candidate

ADDITIONAL

Volunteer: Raleigh Housing Justice Team Leader at Carolina Jews for Justice, 2020 – 2021
Interests: Ultimate Frisbee, Chess

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Eichner,Abraham
Student#: 06447601

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	510	003	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	A
LAW	530	002	Criminal Law	Barbara Mcquade	4.00	4.00	4.00	A
LAW	580	004	Torts	Scott Hershovitz	4.00	4.00	4.00	A-
LAW	593	011	Legal Practice Skills I	Nancy Vettorello	2.00		2.00	H
LAW	598	011	Legal Pract:Writing & Analysis	Nancy Vettorello	1.00		1.00	H
Term Total				**GPA: 3.900**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.900**		**12.00**	**15.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	520	003	Contracts	Kristina Daugirdas	4.00	4.00	4.00	A
LAW	540	003	Introduction to Constitutional Law	Don Herzog	4.00	4.00	4.00	A
LAW	569	002	Legislation and Regulation	Nina Mendelson	4.00	4.00	4.00	A
LAW	594	011	Legal Practice Skills II	Nancy Vettorello	2.00		2.00	H
Term Total				**GPA: 4.000**	**14.00**	**12.00**	**14.00**	
Cumulative Total				**GPA: 3.950**		**24.00**	**29.00**	

Continued next page >

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Eichner,Abraham
Student#: 06447601

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	410	001	Clean Energy & Climate Chg Law	Howard Learner	2.00	2.00	2.00	A
LAW	751	001	Accounting for Lawyers	James Desimpelare	3.00	3.00	3.00	A
LAW	791	002	Environmental Crimes	Michael Fisher Warren Harrell	3.00	3.00	3.00	A
LAW	793	001	Voting Rights / Election Law	Ellen Katz	4.00	4.00	4.00	A
LAW	900	393	Research	Patrick Barry	1.00		1.00	S
Term Total				**GPA: 4.000**	**13.00**	**12.00**	**13.00**	
Cumulative Total				**GPA: 3.966**		**36.00**	**42.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	608	001	Advanced Legal Research	Shay Elbaum Kate Britt	2.00	2.00	2.00	A
LAW	657	001	Enterprise Organization	Edward Fox	4.00	4.00	4.00	A+
LAW	679	001	Environmental Law and Policy	Rachel Rothschild	4.00	4.00	4.00	A+
LAW	842	001	Envt'l Law:Gaps&Uninten Conseq	Andrew Buchsbaum	3.00	3.00	3.00	A
LAW	900	393	Research	Patrick Barry	1.00		1.00	S
Term Total				**GPA: 4.184**	**14.00**	**13.00**	**14.00**	
Cumulative Total				**GPA: 4.024**		**49.00**	**56.00**	
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	05/30/2023							
LAW	630	001	International Law	Karima Bennoune	4.00			
LAW	677	001	Federal Courts	Gil Seinfeld	4.00			
LAW	693	001	Jurisdiction and Choice Of Law	Mathias Reimann	4.00			
LAW	797	001	Model Rules and Beyond	Bob Hirshon	3.00			

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Eichner,Abraham
Student#: 06447601

University Registrar

End of Transcript
Total Number of Pages 3

University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

May 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to give my strongest recommendation to Abe Eichner, who is applying to you for a clerkship. Abe is extremely strong analytically and a fine, crisp writer, with a down-to-earth, unassuming manner. He is in the very top group of students I have taught since arriving at Michigan Law over 20 years ago.

I got to know Abe as a student in my Legislation and Regulation class in the winter of 2022. Legislation and Regulation is a course that combines core administrative law concepts with a grounding in statutory interpretation and an introduction to legislative process. Even as a 1L in this large and talented class that included many upperclass students, it was clear early on that Abe was among the best, rapidly assimilating the material and perceiving a legal framework's implications for the administrative state, regulated entities, and those who hope to benefit from a regulatory structure. Abe really shone on the fully blind-graded final exam, where he received the top score in the class by a significant margin, earning an A and the so-called "Certificate of Merit" for the top-performing student in the class. His analysis on this time-limited exam was thorough and nuanced, while managing to be concise as well. In answer to one question, he wrote a particularly strong answer analyzing heavy use of interpretive canons by courts prior to affording an agency position Chevron deference. Especially given that he was only a 1L at the time, he also showed great maturity in assessing the strength of particular legal arguments.

Abe's very strong performance in my class was typical; he has continued to perform at a very high level, earning certificates of merit in other classes and, as of this writing, a 3.97 GPA overall at a school very committed to maintaining a grading curve. I expect Abe to graduate at or very near the top of his class. I am also looking forward to supervising an independent study for Abe as he revises and develops an insightful project on the inclusion of so-called "climate co-benefits" in regulatory analyses of proposed air pollution regulation.

At a personal level, Abe is thoughtful and engaging, with a serious manner. He came to law school after a few years working on policy and in government; he is committed to working to serve the public interest, whether through government work or work through a non-profit. My sense is that he gets along well with his peers. I believe he would be a wonderful addition to chambers, and I urge you to give him very serious consideration.

Very truly yours,

Nina A. Mendelson
Joseph L. Sax Collegiate Professor of Law

Nina Mendelson - nmendel@umich.edu - 734-936-5071

Department of Energy
Washington, DC 20585

April 11, 2023

Dear Judge:

I write in support of Abe Eichner's application for a Federal clerkship.

Abe Eichner was a summer legal intern for the Offices of the Assistant General Counsel for Enforcement and the Assistant General Counsel for Litigation in the Office of the General Counsel at the United States Department of Energy (DOE) from May to July 2022. I was Abe's supervising attorney during his time with the Office of the Assistant General Counsel for Litigation. I coordinated Abe's litigation assignments with the other litigation attorneys and provided Abe with my own assignments.

During Abe's time with Litigation, Abe provided high quality work product and performed at a very high level for an intern. Abe's assignments were completed in a timely manner and his finished work product greatly assisted the Litigation group with its cases. Abe's work product was very detail-oriented, thorough, and thoughtful. In his work product, Abe showed a firm grasp of the legal issues with clear, concise writing. Abe's research skills were also impressive as he was able to quickly delve into the issues for his assignments through careful, targeted research. Abe's demeanor was always professional and personable. In fact, Abe easily collaborated with the litigation attorneys and was quick to engage with his analysis of a legal issue. Throughout the internship, Abe also demonstrated an affinity for government work and environmental law and expressed interest to me in pursuing a career of public service in the future.

While working with Litigation, Abe handled adeptly an assortment of assignments related to active cases within the group. Abe assisted with drafting motion for summary judgment and discovery requests for an Equal Employment Opportunity Commission constructive discharge case and a motion for summary judgment in a Freedom of Information Act (FOIA) case. Abe took the lead on one FOIA case and drafted an answer to a FOIA complaint. And Abe assisted also in drafting a motion for summary judgment in Energy Policy and Conservation Act (EPCA) challenge to a DOE rulemaking on short-cycle dishwashers.

In addition, during his time in the Office of Enforcement, Abe wrote series of memoranda assessing the risk a recent Fifth Circuit decision posed to EPCA enforcement actions before administrative law judges. In his work product, Abe recommended a course of action to be followed in an EPCA enforcement action.

Abe was very responsive and always willing to ask questions regarding his assignments to effectively hone the scope of the work. I was most impressed at Abe's ability to get up to speed on areas of the law that he did not have prior experience in to assist on projects. In one project in particular, the Office of the General Counsel was looking for an intern to conduct an analysis of the Department's authorities to make grants under the new Bipartisan Infrastructure Law. Based on Abe's performance with his Litigation assignments, I recommended him for this assignment outside of Litigation and Enforcement. Abe reviewed the new legislation and agency authorities and did an excellent job synthesizing all the information. Abe produced work product that was

easily digestible and could be incorporated into advice for client program offices. Based on that experience, I believe Abe will bring this same ability to his work as a law clerk.

It was a pleasure to work with Abe during his internship with the Office of the Assistant General Counsel for Litigation last summer. I would work with Abe again and I believe Abe would be an asset to any court or organization in his post law school endeavors. I wholeheartedly recommend Abe for a clerkship.

Sincerely,

Kristin Koernig

Kristin N. Koernig
General Attorney

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
ANN ARBOR, MICHIGAN 48109-1215

ANDY BUCHSBAUM
Adjunct Professor of Law

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Abe Eichner for a judicial clerkship. I am a lecturer at the University of Michigan Law School, where I have taught environmental law and federal litigation courses for over 25 years. Until recently, I also worked full-time for the National Wildlife Federation, directing various national and regional offices and legal and policy programs. In those roles, I have had the chance to supervise, work with and assess many law students. Abe's work is among the best I've seen.

Abe is a student in my Environmental Law: Gaps and Unintended Consequences seminar this semester, where he has excelled. The course is a mixture of lecture and discussion culminating in a challenging final project: identifying and analyzing a significant gap or unintended consequence in an environmental statute and then proposing regulatory, judicial or legislative changes to address that gap or consequence. The assignment also requires students to assess the gaps or unintended consequences of their proposed solution. For many students, this paper is particularly difficult because it asks them both to do a deep analysis of the current law and to use their creativity and judgment to determine how the law might best be changed.

Abe has prepared a discussion paper and presented it to the class, and his work is outstanding. His topic is co-benefits for greenhouse gas pollutants under different regulatory schemes in the Clean Air Act. The law here is highly complex, as are the science and economics—and Abe has done a masterful job in his research, analysis and presentation. His exploration of the statute, rules and caselaw is excellent, thorough and insightful. And he has gone a step beyond, exceeding all expectations for this course: he conducted a review of over one hundred cost-benefit analyses (CBAs) prepared for Clean Air Act rulemakings and is incorporating the results of that review into his project. This is cutting-edge research; to my knowledge, no one has done such a comprehensive investigation of Clean Air Act CBAs or applied them to the co-benefits issue.

In addition to his top-notch paper, Abe is a frequent and thoughtful participant in class, reflecting a serious mind and judgment beyond his years.

I highly recommend Abe for a judicial clerkship. Abe is very smart – he catches on quickly and then dives in deeply and thoughtfully to understand and improve an idea or theory. He is an enthusiastic and thorough researcher, which he uses to inform his ideas. He looks at any question from every angle and develops a nuanced, sophisticated and mature understanding of the context and the potential solutions. He is an original thinker, willing and able to consider and develop innovative approaches and ideas. At the same time, he is disciplined, always testing his ideas and arguments, willing to modify them to make them most effective. And he's a wonderful colleague; his classmates like working with him because of what he produces himself and the supportive way in which he helps all those around him be better in their work.

Abe will be invaluable to any office fortunate enough to hire him. Please do not hesitate to contact me if you have any questions.

Sincerely,

Andy Buchsbaum

Andrew Buchsbaum - buchs@umich.edu